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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

NICK STOKOVICH,

Petitioner,

v.

THE VILLAGE OF LAKE VILLA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Illinois demolition statute, in a non-emergency situation, deprive a person of his or her property without due process by permitting a trial court to determine whether or not the property owner may repair the property based solely upon the court's determination of whether the cost of repair is reasonable in light of the value of the property?

2. Except in emergency situations, is it a violation of due process to deprive a property owner of his or her property without affording the property owner the post-hearing opportunity to repair the property regardless of the cost of repair?

3. Based upon the divergence of opinions among the states as noted herein, will a property owner's right to repair his or her property in the face of a governmental demolition demand depend upon how an individual state interprets the property owner's right to due process or will a definitive standard be established which will apply to all property owners wherever situated?

LIST OF PARTIES

Nick Stokovich is the Petitioner herein. Dorothy Stokovich and Nick Stokovich were the Appellees in the Illinois Supreme Court proceedings. Dorothy Stokovich is deceased.

The Village of Lake Villa was the Appellant in the Illinois Supreme Court proceeding and is listed as the Respondent herein.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Nick Stokovich ("Stokovich") respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Illinois, which held that the Illinois demolition statute is not in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

OPINIONS BELOW

The Supreme Court of Illinois held that the Illinois demolition statute, 65 ILCS 5/11-31-1, is constitutional and thus reversed the holding of the Appellate Court of Illinois that the statute violated due process. The opinion of the Supreme Court of Illinois is published as *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 810 N.E.2d 13 (2004), and is reprinted in the Appendix at App. 1. The opinion of the Appellate Court of Illinois, Second District, holding the statute violative of due process is published as *Village of Lake Villa v. Stokovich*, 334 Ill. App. 3d 488, 788 N.E.2d 750 (2nd Dist. 2002). It is reprinted at App. 30. The record of the ruling of the Circuit Court of Lake County, Illinois, ordering demolition on July 21, 2000 is reprinted at App. 52.

JURISDICTION

The opinion of the Supreme Court of Illinois was filed on February 20, 2004. The Illinois Supreme Court denied Stokovich's petition for rehearing on May 24, 2004. App. 56. The Illinois Supreme Court stayed the issuance of its mandate on July 9, 2004. This Court has jurisdiction pursuant to 28 U.S.C. §1257. Pursuant to Supreme Court Rule 29.4(c), it is noted that 28 U.S.C. § 2403(b) may apply and the notification

required by Rule 29.4(c) has been made to the Illinois Attorney General.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Fifth Amendment, United States Constitution:

> No person shall be.... deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Fourteenth Amendment, United States Constitution:

> Section 1. ...nor shall any State deprive any person of life, liberty or property, without due process of law...

The pertinent portion of Section 11-31-1 of the Illinois Municipal Code provides:

> (a) The corporate authorities of each municipality may demolish, repair, or enclose or cause the demolition, repair, or enclosure of dangerous and unsafe buildings or uncompleted and abandoned buildings within the territory of the municipality and may remove or cause the removal of garbage, debris, and other hazardous, noxious, or unhealthy substances or materials from those buildings. In any county having

adopted by referendum or otherwise a county health department as provided by Division 5-25 of the Counties Code [55 ILCS 5/5-25001 et seq.] or its predecessor, the county board of that county may exercise those powers with regard to dangerous and unsafe buildings or uncompleted and abandoned buildings within the territory of any city, village, or incorporated town having less than 50,000 population.

The corporate authorities shall apply to the circuit court of the county in which the building is located (i) for an order authorizing action to be taken with respect to a building if the owner or owners of the building, including the lien holders of record, after at least 15 days' written notice by mail so to do, have failed to put the building in a safe condition or to demolish it or (ii) for an order requiring the owner or owners of record to demolish, repair, or enclose the building or to remove garbage, debris, and other hazardous, noxious, or unhealthy substances or materials from the building. It is not a defense to the cause of action that the building is boarded up or otherwise enclosed, although the court may order the defendant to have the building boarded up or otherwise enclosed. Where, upon diligent search, the identity or whereabouts of the owner or owners of the building, including the lien holders of record, is not ascertainable, notice mailed to the person or persons in whose name the real estate was last assessed is sufficient notice under this Section.

The hearing upon the application to the circuit court shall be expedited by the court and shall be given precedence over all other suits. Any person entitled to bring an action under subsection (b) shall have the right to intervene in an action brought under this Section.

The cost of the demolition, repair, enclosure, or removal incurred by the municipality, by an intervenor, or by a lien holder of record, including court costs, attorney's fees, and other costs related to the enforcement of this Section, is recoverable from the owner or owners of the real estate or the previous owner or both if the property was transferred during the 15 day notice period and is a lien on the real estate; the lien is superior to all prior existing liens and encumbrances, except taxes, if, within 180 days after the repair, demolition, enclosure, or removal, the municipality, the lien holder of record, or the intervenor who incurred the cost and expense shall file a notice of lien for the cost and expense incurred in the office of the recorder in the county in which the real estate is located or in the office of the registrar of titles of the county if the real estate affected is registered under the Registered Titles (Torrens) Act [765 ILCS 35/0.01 et seq.].

* * * * * * *

65 ILCS 5/11-31-1(a).

STATEMENT OF THE CASE

On January 7, 1998, the Village of Lake Villa (the "Village"), sent notice to Dorothy Stokovich and Nick Stokovich (the "Stokoviches") pursuant to 65 ILCS 5/11-31-1 demanding that the building at 201 Cedar Avenue in Lake Villa, Illinois be demolished within 30 days. (R. C8).[1] The building had been in the Stokovich family since 1949 and it was where the family business was started. (Report of Proceedings 64). The Stokoviches responded to the notice through counsel by voice mail on January 23, 1998 and by letter dated February 3, 1998 asking for more details and more time. (Defendants' Trial Exhibit 1). The Village responded to that request by filing a one count Complaint for Demolition on February 18, 1998 under 65 ILCS 5/11-31-1 and by sending its counsel's letter dated February 18, 1998. (Defendant's Trial Exhibit 2; Stipulations as to Certain Facts and Exhibits, Para. 2, R. C498).[2]

The Stokoviches moved to dismiss the Complaint based on the unconstitutionality of the demolition statute. (R. C31). The motion was denied. (R. C50). On subsequent motion the Village's original Complaint was dismissed as deficient on August 13, 1998. (R. C98 and C112). The Village filed its Amended Complaint for Demolition on August 20, 1998 containing Count I for demolition and Count II for repair under the demolition statute (in the alternative) and Count III for fines for Lake Villa ordinance violations. (R. C113). Count III was dismissed on October 29, 1998 due to improper notice. (R.

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[1]"R." refers to the Record in the Circuit Court of Lake County, Illinois. "Report of Proceedings" refers to the trial proceedings in the Circuit Court of Lake County, Illinois on July 29, 20 and 21, 2000.

[2]The Village was not proceeding under Subsection (e) of the demolition statute that applies to buildings that constitute immediate and ongoing hazards to the community.

C207). The Village filed its Second Amended Complaint on February 25, 1999 with the same three (3) counts, but with the addition of notice allegations. (R. C211). The Stokoviches renewed their constitutional challenge to the demolition statute. (R. C299). The motion was denied, (R. C309), and the Stokoviches filed their Answer on April 14, 1999 denying that the building should be demolished. (R. C 391).

After several continuances, the matter was tried before Judge John Goshgarian on July 19, 20 and 21, 2000.[3] During the Village's case in chief, Mrs. Dorothy Stokovich testified that she had sold the property to her son Nick for the sum of $100,000 in 1979 or 1980. (Report of Proceedings 61; 66). Both she and Nick Stokovich testified that the building had been unoccupied since about 1992 although Nick would visit the building regularly. (Report of Proceedings 65; 358; 371-373). The Village's chief inspector, August Hibel, testified that he could not give a specific figure of the worth of the building, (Report of Proceedings 176); he opined, however, that the building was deteriorated in excess of fifty percent (50%) of its value. (Report of Proceedings 104-106). Neither he nor any of his subinspectors did any testing on the property, (Report of Proceedings 153; 154; 161; 162), but they did testify as to existing and potential defects. (App. 33, *et seq.*). No evidence of value was presented by the Village.[4] The Stokoviches

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[3]The continuances were by and large due to either the Court's case load or the parties' unavailability, and in the Fall of 1999 and Winter of 2000 due to Judge Goshgarian's three (3) month suspension.

[4]The Stokoviches moved for judgment at the close of the Village's case based on the Village's failure to present evidence regarding cost and value as required by *City of Aurora v. Meyer,* 38 Ill.2d 131, 230 N.E.2d 200 (1967). The Court denied the motion and the Stokoviches elected to attempt to introduce evidence regarding cost and value.

attempted to introduce evidence to show that the value of the property as it currently existed was $150,000 to $160,000 and, if renovated, the property would be worth $230,000 to $240,000. (Report of Proceedings 537-539). The trial court excluded this valuation testimony. (Report of Proceedings 515-518 and 534-535). The Stokoviches' structural engineer and building contractor testified that the building was by and large structurally sound and could be repaired. (App. 54-5). The Stokoviches were allowed to present evidence to show that the cost of repair of items that allegedly made the building dangerous to the public was $17,060, (Report of Proceedings 508-509), while the cost for a complete rehab of the building which would make it habitable was between $68,000 and $75,000. (Report of Proceedings 501; 506). At the close of the Stokoviches' case, the trial court ordered demolition. (R. C500). For valuation of the property, the trial court relied solely on the twenty year old purchase price between Dorothy Stokovich and her son Nick Stokovich, calling it a recent sale. (App. 53). For cost of repair, the trial court relied solely on the cost of a total rehab. (*Id.*) Defendants timely appealed the judgment and the Appellate Court stayed the enforcement of the trial court's demolition order. (R. C616).

After the Appellate Court affirmed the Circuit Court, but failed to address the relevant constitutional questions raised by the Stokoviches (including those presented herein), the Stokoviches petitioned the Illinois Supreme Court for review. The Court declined to take the case, but ordered the Appellate Court to address the constitutional issues. *Village of Lake Villa v. Stokovich*, 198 Ill. 2d 593, 762 N.E.2d 512 (2002). After first finding the statute constitutional, the Appellate Court on rehearing in a unanimous decision determined that the demolition statute was unconstitutional:

> We agree with defendants that, as it presently exists, section 11-31-1 is

> unconstitutional because it authorizes a municipality to take private property without compensation and without due process by demolishing or requiring demolition without first giving the owner the choices of repairing the property within a reasonable time and of spending whatever it costs to bring the property into compliance. As pointed out in Washington v. City of Winchester, 861 S.W.2d 125, 127 (Ky. App. 1997), the cost of compliance as well as the method is a property owner's decision and "far be it from the City to say how a reasonable person should spend his/her money."

(App. 50-1).

The Illinois Supreme Court accepted the Village's petition for review and found the statute constitutional, but vacated the demolition order. (*Id.* At 24-5). The Supreme Court reviewed the statute under the rational basis test and held that the statute was rationally related to the legitimate interest of eliminating dangerous properties. (*Id.* at 18). The Court vacated the demolition order, however, due to the improper exclusion of evidence of value. (*Id.* at 22). Nick Stokovich and Bank One, as successor trustee under Dorothy Stokovich's trust (Mrs. Stokovich having passed away), petitioned for rehearing on the basis, inter alia, that other states' high courts had determined that limitations on an owner's right to repair were arbitrary and unreasonable. The Court denied the petition for rehearing on May 24, 2004. (App. 56).

REASONS WHY THE WRIT SHOULD BE GRANTED

Summary

The important question involved in this case is whether any significant substantive limits should be imposed on the

government's police power in the context of involuntary building demolitions. While it is widely recognized, as the Illinois Supreme court noted over 35 years ago, that "It is only in cases where an absolute necessity exists that courts adopt the drastic method of correction by ordering destruction of the property," when it came time to give vigorous application to that vigorous statement, the Illinois Supreme Court went wobbly. *Compare City of Aurora v. Meyer* 38 Ill. 2d 131, 136, 230 N.E.2d 200, 203 (1967) (quoted above) *with Village of Lake Villa v. Stokovich,* App. 1. Far from vouchsafing "absolute necessity" as the appropriate restraint on the state's police power, the Court has diluted the restraint to the point of stating that the owner who "...chooses to contest whether the building is dangerous and unsafe and to litigate the question of whether the building is readily repairable, runs the risk that he will lose on the merits and an order of demolition will issue." App. 20. Thus, not only is "absolute necessity" not the touchstone, an owner who exercises his or her right to a due process hearing is forced to ante up the property into the pot. This is indeed a far cry from the Court's oft-cited "absolute necessity" shibboleth.

Moreover, it is irreconcilable with the holdings of other states' high courts. Until recently, the leading right to repair case was *Horton v. Gulledge,* 277 N.C. 353, 177 S.E.2d 885 (1970). In *Horton*, the North Carolina Supreme Court struck down as unconstitutional an ordinance that required demolition after notice, a hearing and determination that the cost of repair was sixty percent (60%) or more of the value of the building. The Court found that imposing such a limitation on what the **owner** may spend to repair the property was arbitrary and unreasonable, and violated due process. *Id.* at 363, 177 S.E. 2d at 892.

In *Johnson v. City of Paducah*, 512 S.W.2d 514 (Ky. Ct. App. 1974), the Kentucky high Court relied upon *Horton* in

striking down a similar law. In *Johnson* the Court held that the City of Paducah's ordinance and the statutes authorizing it violated due process because, although notice and a hearing were required, the owner's right to repair was capped at 50% of cost to value.

Perhaps the clearest and most pragmatic formulation of the proper circumscription of the state's police power in this area was made by the Georgia Supreme Court: "If the city desires him to demolish the property without giving him the right to correct any and all deficiencies found in a judicial hearing of whether or not a nuisance exists under Code § 72-401, then let the property be condemned and pay him for it . . ." *Shaffer v. City of Atlanta*, 223 Ga. 249, 251, 154 S.E. 2d 241, 243 (1967). The Georgia Appellate Court understood its Supreme Court's pronouncement and relying on *Shaffer* struck down as unconstitutional an ordinance that imposed a 50% cap on an owner's right to repair. *Horne v. City of Cordele,* 140 Ga. App. 127, 230 S.E.2d 333 (Ga. Ct. App. 1976).

This Court should grant certiorari in order to resolve the conflict between Illinois and the other States noted - given the age of the other States' decisions discussed above, it is highly likely that the Illinois Supreme Court's decision in this case will become the leading case in the demolition area and will engender substantial confusion in the area. The Illinois Supreme Court's decision is also inconsistent with *Miller v. Schoene*, 276 U.S. 272 (1928) (see Section II below).

In addition to taking away the owner's discretion to repair, under the Illinois Supreme Court's opinion, the trial court may make findings about the property based upon speculation. In the opinion, the Court approved certain of the trial court's findings concerning defects that were not based on the results of testing or any reliable method of verifying defects (e.g., the *possible* buildup of methane gas). App. 24. As the dissent pointed out, "The Circuit Court's findings were *purely*

speculative. . . . There was simply no evidence regarding the buildup of methane gas." App. 28 (emphasis added).

Thus, the bleak landscape for the owner who wishes to have a due process hearing concerning the condition of the property at issue is this: the owner loses discretion concerning repair of the property (it goes to the court), the court may find defects based on speculation, the owner will incur attorneys' fees to defend the action and, if demolition is ordered, will be charged with the municipality's attorneys' fees.[5] Under these circumstances - burdens, more accurately - the right to a due process hearing is illusory. Certiorari should also be granted to preserve property owners' right to a due process hearing when the government seeks the "drastic method of correction"- demolition of private property.

I. THE ILLINOIS SUPREME COURT'S OPINION CONFLICTS WITH OTHER STATES' OPINIONS.

"[I]f she wants to pour huge sums of money into her unfit buildings, she has that option. A reasonable person may very well choose demolition, but it's her money and her choice."

Washington v. City of Winchester, 861 S.W.2d 125, 127 (Ky. App. 1993).

The long-standing tension between the government's police power and individuals' property rights is at the heart of

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[5]The circuit court in this action in fact awarded the Village attorneys' fees and costs in the amount of $56,479.86. The court also recently awarded the Village $51,200.00 in fines for the very same defects under a separate bifurcated count.

this case. Specifically, who, as between a judge or the property owner, should determine whether to repair or demolish property when public safety defects are found to exist at a property? The Illinois Supreme Court has ruled that a judge should decide when repair is reasonable. Courts in other jurisdictions, however, have emphatically rejected that position. In *Horton v. Gulledge*, the North Carolina Supreme Court ruled that the owner, and not a judge or hearing officer, should make the determination, quoting with approval the following rudimentary tenets:

> It is not the province of this court, and this court will not undertake to decide as an economic proposition whether it would be more desirable for plaintiff to raze the present structure to the foundation and use the material and the cost of repair for the erection of another structure upon that foundation, or to repair and rebuild the present structure. That is a matter in which the plaintiff is entitled to act upon her own choice and judgment...

Horton v. Gulledge, at 361-2, 177 S.E.2d at 891, quoting *Abraham v. City of Warren*, 67 Ohio App. 492, 37 N.E.2d 390 (1940).

In its February 20, 2004 opinion, the Illinois Supreme Court attempted to distinguish several out-of-state cases relied upon by Stokovich on the basis that the laws at issue therein allowed a *municipal officer* to order demolition. App. 16. The Court has misapprehended the holding of *Horton v. Gulledge* and overlooked *Johnson v. City of Paducah*. In both *Horton v. Gulledge* and *Johnson v. City of Paducah*, the high courts struck down laws that are indistinguishable from the Illinois demolition statute for due process purposes.

A. North Carolina, *Horton v. Gulledge*: In *Horton v. Gulledge*, the ordinance at issue provided that after notice and

a hearing the Inspector of Buildings and the Housing Commission could cause the demolition of a building determined to be unfit for human habitation if the cost of repair was 60% or more of the value of the building. *Horton,* at 354, 177 S.E.2d at 886. The North Carolina Supreme Court struck down the cap on repairs, holding that it was arbitrary and unreasonable. *Id.* at 363, 177 S.E.2d at 892. The procedural history was comparable to that in the case at bar, i.e., notice, hearing, order of demolition due to the cost to value ratio:

> The evidence, though in conflict, includes testimony which supports the findings of fact made by the Housing Commission and approved by the Superior Court. Consequently, for the purpose of this appeal, we accept as true the findings that the petitioner's house is presently unfit for human habitation and dangerous, and that repairs Necessary to bring it into conformity with the Housing Code will cost 60%, or more, of the present value of the building. These findings were made after notice and after a hearing in which the record discloses no failure to comply with prescribed procedures.

Id. at 357-8, 177 S.E.2d at 888. The Court found that this procedure, notice, hearing and denial of the post-hearing opportunity to repair was unconstitutional:

> The order of demolition in this case, if carried out, would clearly deprive the plaintiff both of property presently owned by him and of the liberty to invest in its improvement.... In the instant case, it appears from the findings of the Housing Commission that the house in question can be repaired so as to comply with the city's Housing Code, be suitable for human habitation and be no longer a threat to public health, safety,

> morals or general welfare. To require its destruction, without giving the owner a reasonable opportunity thus to remove the existing threat to the public health, safety and welfare, is arbitrary and unreasonable. Such power may not be delegated to or exercised by a municipal corporation of this State by reason of Art. I, §17, of the Constitution of North Carolina (Art. I, §19, of the revised Constitution, ratified at the general election of 1970).

Id. at 362-3, 177 S.E.2d at 891-2.[6]

Horton v. Gulledge is on point and has been relied upon by several other courts. It is not, as the Illinois Supreme Court has found, distinguishable because the hearing was an administrative hearing as opposed to a judicial hearing. Due process simply requires a hearing and frequently the hearing afforded is not a judicial hearing. *See, e.g., Wendl v. Moline Police Pension Board*, 96 Ill. App. 3d 482, 421 N.E.2d 584 (3d Dist. 1981) (administrative hearings regarding disability pension terminations - judicial proceeding not mandated).

Illinois has chosen to make the demolition hearing a judicial hearing, which is perhaps laudable. But Illinois property owners should not be penalized because the demolition statute prescribes a judicial hearing. *Horton v. Gulledge* reversed the superior court's judgment and vacated the demolition order due to the 60% cap on the post-hearing right

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[6]Article I, §19 of the Constitution of North Carolina provides in pertinent part, "No person shall be.... in any manner deprived of his life, liberty, or property, but by the law of the land." The North Carolina Supreme Court has determined that the term the "law of the land" is synonymous with "due process of law" as used in the Fourteenth Amendment. *See, e.g. Bacon v. Lee*, 353 N.C. 696, 720-1, 549 N.E.2d 840, 856 (2001).

to repair. *Id.* at 363, 177 S.E.2d at 892. There is no indication whatsoever that the Court only deemed the 60% post-hearing cap unconstitutional because the due process hearing was other than a judicial hearing. Rather, the defect was the arrogation of the owner's discretion to repair. It can hardly be said that requiring demolition if a court were to determine the matter, would somehow cure the problem - the owner would still be deprived of the liberty to invest in the property's improvement. *Horton v. Gulledge* has been recognized as the leading case in this area (see case note at 43 A.L.R.3d 905, 916) and has been followed by other courts.

B. Kentucky, *Johnson v. City of Paducah*: Kentucky's high court in *Johnson v. City of Paducah* followed *Horton* in striking down as unconstitutional a limitation on post-hearing repair. Although *Johnson v. City of Paducah* was relied upon heavily by Stokovich before the Illinois Supreme Court, the Court's decision does not discuss *Johnson v. City of Paducah* and it appears that the Court overlooked it.[7] In *Johnson*, the ordinance "and the statutes on which it is based" provided for notice and a hearing and post-hearing opportunity to repair only if the cost to value ratio was no more than 50%. *Id.* at 515. The Kentucky high Court (called the Court of Appeals at the time) held both the ordinance and statutes unconstitutional because the limitation on the post-hearing right to repair violated due process. *Id.* at 516. Like Illinois in *City of Aurora v. Meyer*, the Kentucky high Court had previously treated its demolition statutes but had not reviewed the constitutionality of the statutes:

> In *City of Jenkins v. Cury*, Ky., 347 S.W.2d 85 (1961), we recognized the validity

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[7]The owners brought this fact to the Illinois Supreme Court's attention in their Petition for Rehearing, but the Court denied said Petition.

> and applicability of KRS 80.620 and 80.720 insofar as they permitted the city to demolish a structure and subject the real estate to a lien for the cost of demolition. We did not, however, consider the constitutionality of the provisions delineating when an owner of a structure unfit for human habitation was deprived of the right to repair it and bring it into compliance rather than to demolish it.

Id.

In striking down the ordinance and statutes, the *Johnson* Court relied upon *Horton v. Gulledge* and quoted with approval the *Horton* Court's finding that depriving the owner of the post-hearing opportunity to repair was arbitrary. *Id. Johnson* is arguably more compelling than *Horton* with respect to the question at hand because the circuit court conducted a hearing and found "that the defects in the dwellings included lack of adequate ventilation, light, or sanitary facilities, dilapidation, disrepair, or structural defects and uncleanliness." *Id.* at 515. The circuit court approved the demolition order. *Id.* The high Court reversed stating:

> Section 2 of the Constitution of Kentucky provides that absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic not even in the largest majority. Although the legislative purpose here is a laudable one and is surely in the public interest, the means of its implementation may extend no further than public necessity requires, particularly where there is the taking of property rights without compensation.
>
> In the circumstances presented, the owner should be afforded a reasonable time to

> repair his property so as to comply with the building code requirements if he so desires, unless there is present an imminent and immediate threat to the safety of persons or other property. The provisions of the Paducah Housing Code and the statutes (KRS 80.660 and 80.670) requiring compelled destruction, vel non, when the cost of repair exceeds 50 percent of value are unconstitutional as contravening Section 2 of the Constitution of Kentucky.

Id. at 516.[8]

C. Georgia, *Shaffer v. City of Atlanta* and *Horne v. City of Cordele*: It appears that the Illinois Supreme Court has also misapprehended the significance of *Horne v. City of Cordele*. *Horne* is on point and derives its holding from the Georgia Surpeme Court's ruling in *Shaffer v. City of Atlanta.* The *Horne* Court struck down an ordinance that permitted uncompensated destruction of property where the cost to value ratio was over 50%. As in *Horton* and *Johnson*, the law at issue in *Horne* provided for notice and a hearing before demolition could be ordered and the demolition therein was in fact ordered after notice and a hearing. *Horne*, at 127-8, 230 S.E.2d at 334. The Court held:

> Our holding is that any ordinance which authorizes demolition of a structure within the city without compensation to the owner merely because the cost of repair exceeds the value of

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[8]Section 2 of the Kentucky Constitution embraces the traditional concepts of due process. *Kentucky Milk Marketing & Antimonopoly Comm'n v. Kroger Co.*, 691 S.W.2d 893 (Ky. 1985). Thus, the Kentucky Court struck down an ordinance and statutes pursuant to due process solely because they restricted property owners' post-hearing right to repair on the basis of cost.

> the structure or any percentage thereof, without first allowing opportunity to repair (and, if necessary, providing for discovery of the criteria which must be met to bring the structure up to a minimum standard) is unconstitutional and void.

Id. at 131, 154 S.E.2d at 335-6. The *Horne* Court determined that the principle "is inherent in *Shaffer v. City of Atlanta*, 223 Ga. 249..." *Id.* at 130, 154 S.E.2d at 335. In *Shaffer*, the Georgia Supreme Court stated, "If the city desires him to demolish the property without giving him the right to correct any and all deficiencies found in a judicial hearing of whether or not a nuisance exists under Code § 72-401, then let the property be condemned and pay him for it . ." *Shaffer*, at 251, 154 S.E.2d at 243.

D. Certiorari Should Be Granted to Resolve the Conflict. *Horton, Johnson*, and *Horne* strongly support Stokovich's argument that due process requires that property owners be afforded three rights before their property may be demolished in the non-emergency demolition context: notice, a hearing and a reasonable opportunity to repair regardless of cost. The Illinois Supreme Court apparently recognizes these three rights, but has made the right to repair regardless of cost contingent on the owner's foregoing any hearing. In this respect, the Court is directly in conflict with *Horton, Johnson* and *Horne*. The proposition that an owner who "chooses to contest whether the building is dangerous and unsafe and to litigate the question of whether the building is readily repairable, runs the risk that he will lose on the merits and an order of demolition with issue", (App. 20), is at odds with the holdings and spirit of *Horton, Johnson,* and *Horne*.

In each of those cases, the property at issue was found to be unsafe at a hearing and in each case any cost limitation on the post-hearing right to repair was categorically rejected. In order to satisfy due process the ordering of these rights must be

as stated in *Miles v. District of Columbia*, 510 F.2d 188 (D.C. Cir. 1975): "...notice, a hearing and ample opportunity to demolish the building himself or to do what suffices to make it safe or healthy; such a procedure is the essence of the governmental responsibility to accord due process of law." *Id*, at 192. This ordering of the rights protects property owners from arbitrary and unreasonable takings, whereas the Illinois Supreme Court's decision places such a burden and risk on property owners as to take away their right to a hearing, or more bluntly, their right to disagree with the municipality.

Certiorari should be granted to resolve the conflict among the states and to clarify property owners' procedural and substantive due process protections when the government wishes to destroy private property.

II. THE ILLINOIS SUPREME COURT'S OPINION IS INCONSISTENT WITH THIS COURT'S RULING IN *MILLER V. SCHOENE*.

Before the Illinois Supreme Court, it was argued by the amici curiae[9] on behalf of the Village that the Illinois demolition statute is constitutional under the teaching of *Miller v. Schoene*, 276 U.S. 272 (1928). In fact, it is the Illinois Supreme Court's holding that is inconsistent with *Miller*. In *Miller*, the Court was very clear that the destruction of the diseased red cedar trees at issue therein was unavoidable: "For where, as here, *the choice is unavoidable*, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process." *Id*. at

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[9] Amici City of Chicago and the Illinois Municipal League filed an amicus brief. In addition, the City of Chicago participated in oral argument before the Court.

280 (emphasis added). The *Miller* Court upheld the Virginia statute authorizing the destruction of the diseased trees and explained the rationale for the destruction: "The only practicable method of controlling the disease and protecting apple trees from its ravages is the destruction of all red cedar trees, subject to the infection, located within two miles of apple orchards." *Id.* at 278-9.

Clearly, then, due process does constrain discretionary destruction of private property. As the Illinois Supreme Court recognized in *City of Aurora v. Meyer*, destruction is only permitted in cases of "absolute necessity." Unfortunately, the Court did not make that platitude a reality in its February 20, 2004 opinion. Yesterday's necessity has become today's discretion based on governmental convenience. In the instant case, destruction is undeniably not "the only practicable method" of abating the safety defects - repair is possible, viable and should be permitted without the need for a judge's blessing.[10] Certiorari should be granted to clarify the proper application of the principles inherent in *Miller*.

III. PROTECTING THE POST-HEARING RIGHT TO REPAIR WOULD PROMOTE FAIRNESS AND DISCOURAGE OPPRESSIVE GOVERNMENTAL ACTION.

By requiring the government to follow

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[10]It would be different if the building at issue were on fire and destruction were the only practicable method of controlling the fire and preventing it from spreading. Under *Miller*, uncompensated demolition of such a building would pass muster. Mr. Stokovich should have been permitted to repair the defects in 2000 after the trial; he was not, but the passage of over four (4) years without incident has certainly proven that the property did not pose a threat such as that in *Miller*.

> appropriate procedures when its agents decide to 'deprive any person of life, liberty or property,' the Due Process clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them... it serves to prevent governmental power from being "used for purposes of oppression..."

Daniels v. Williams, 474 U.S. 327, 331 (1986) (citations omitted).

The due process goals enunciated in *Daniels*, promoting fairness and preventing the misuse of power, are rooted in the desire to avoid wrongful deprivations. In the demolition context, it is beyond dispute that a wrongful deprivation occurs whenever property that is not dangerous is destroyed. Although not immune from error, a system that requires notice and a hearing puts the government's contentions about the property to the test. Assuming a competent and fair (as opposed to corrupt) apparatus, wrongful deprivations should be the exception rather than the rule.

Wrongful deprivations also occur whenever defective property that poses no immediate threat to public safety is destroyed against the owner's wishes, provided that the owner is willing to repair expeditiously the defects established at the hearing. This substantive right, the owner's right to exercise dominion and control over the property (including expending such funds thereon as the owner sees fit), should be protected and preserved unless destruction is, to use *Miller*'s term, "unavoidable." This principle is inherent in *Miller* and undergirds *Horton, Johnson* and *Horne*.

The Illinois Supreme Court's opinion not only fails to protect the substantive right, it also severely diminishes the procedural due process protections. Under the Court's ruling, a person who elects to have a hearing to contest demolition

"runs the risk that he will lose on the merits and an order of demolition will issue." App. 20. Taken to its logical conclusion, the Court's opinion creates a situation - a classic unintended consequence - wherein a property owner who receives a demolition notice under section 11-31-1 faces a daunting possibility if he or she proceeds to a due process hearing: that a judge will deem the property beyond "reasonable" repair, order demolition, and order the owner to pay the municipality's attorney's fees and costs. Thus, simply because the owner wishes to have a due process hearing in order to contest the government's allegations, the owner faces the very real possibility of: bearing the fees and costs of defense; having the court order demolition with no opportunity to repair; and having the court enter a judgment for the municipality's attorney's fees and costs. It can safely be said that not many owners will subject themselves and their property to such risks. Procedural due process under the Illinois demolition statute exists only for wealthy gamblers.

Increasing the risk to the property owner contemplating trial is the fact that under the Illinois Supreme Court's opinion, the trial court may unabashedly enter a demolition order based on speculative testimony about potential dangers. The Village's inspectors in this case did no testing and yet were allowed to speculate about many matters, including the possible buildup of methane gas and the potential for contamination of the Village's water system. Justice Freeman in his partial dissent has argued vigorously and persuasively that such speculation should not be allowed to form the basis for a demolition order. App. 26-9. Although the dissenting justices did not cast their disapproval in due process terms, it is clear that allowing "purely speculative" evidence and conclusions at trial will further discourage owners from exercising their right to a due process hearing.

Except in the clearest of cases, an owner who receives

a demolition notice under 11-31-1 has only two real choices: repair or demolish.[11] Thus immunized from having their demolition demands tested in due process hearings, the potential for great mischief by municipalities exists. On the other hand, if the right to repair were protected, the opportunity for mischief would be much less because an owner would at least be assured that even if the ruling is adverse (even if that ruling is unsound, as in the present case), he or she would still have the choice of repairing the defects determined by the court. As it is, however, the Illinois decision does not serve to prevent governmental power from being "used for purposes of oppression." *Daniels*, at 331.

Finally, the Illinois Supreme Court's position is, quite frankly, plainly illogical: just when the property owner has the requisite information from the court for making a decision concerning repair, the repair option may very well be taken away by the court. The owner, as in the instant case, may be willing to make some of the repairs initially demanded by the municipality; but if forced to make most or all of them, may decide to demolish the property. The arrogation of discretion to the court will often frustrate the owner's ability to make a rational, considered decision concerning repair. In addition, it is clear that owners are not constrained in their ability to make repairs prior to trial. What sense is there in denying a right to repair the day after trial when the right existed the day before trial? It makes little sense unless the object is to discourage hearings, and, as the City of Chicago (which obtains *hundreds* of demolition orders per year) posited in its amicus brief, to

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[11] Moreover repair may not be a fully realized option at that point because under *City of Marseilles v. Union Bank,* 713 Ill. App. 3d 931, 741 N.E.2d 333, 336 (3rd Dist. 2000), a demolition notice need not contain any information regarding defects at the property. In addition, the owners pre-suit requests for information maybe rebuffed as in the case at bar.

effect abatement in the quickest and easiest way. (Brief of Amici City of Chicago and Illinois Municipal League, pp. 8 and 26). Far from preventing misuse of governmental power, accommodating governmental convenience at the expense of property owners turns due process on its head. As so aptly stated by Justice Holmes, "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416 (1922).

CONCLUSION

To the extent that the ruling of the Illinois Supreme Court is not reversed in this matter, the Petitioner, as an ordinary American and citizen of Illinois, will have been deprived of his right to determine, in his sole discretion, whether or not the making of repairs to his property is in his best interest regardless of cost. The wresting of this individual and personal right from Petitioner through the Illinois judicial processes involved in a building violation matter - a process which vests the trial court with the authority to decide the fate of the Petitioner's property based solely on judicially embraced speculative facts against which a cost-to-value quantative formula is applied - egregiously contravenes not only basic concepts of "fairness" but defies logic and, most critically, offends fundamental due process protections.

Accordingly, because of the clear dichotomy which now exists with respect to the judicial treatment of the Constitutional safeguards of due process required to be afforded property owners vis a vis governmental regulations impacting their individual rights with respect to their property, the Petitioner respectfully requests that Certiorari be granted.

Respectfully submitted,

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APPENDIX

Docket No. 95118-Agenda 16-May 2003.
THE VILLAGE OF LAKE VILLA, Appellant, v. DOROTHY STOKOVICH *et al.*, Appellees.
Opinion filed February 20, 2004.

JUSTICE GARMAN delivered the opinion of the court:

In 1998, plaintiff, Village of Lake Villa, sought authorization from the circuit court of Lake County, pursuant to section 11-31-1 of the Illinois Municipal Code (Code) (65 ILCS 5/11-31-1(a) (West 1996)), to demolish a structure owned by the defendants, Dorothy Stokovich, as trustee under a trust agreement dated September 16, 1992, and Nick Stokovich, her son. After a hearing, the circuit court entered an order of demolition and the property owners appealed. After a lengthy and convoluted procedural history, the appellate court eventually found section 11-31-1 of the Code unconstitutional on due process grounds. 334 Ill. App. 3d 488. We reverse.

BACKGROUND

The structure at issue is approximately 100 years old and was used from 1949 until 1977 as a nursing home. It was subsequently occupied for several years by a caretaker and then by Nick Stokovich. It has been unoccupied since at least 1992.

In 1997, the Village informed the property owners by means of a "red card" posted on the building and a letter sent to Dorothy Stokovich that the building was unsafe, abandoned, dilapidated, and animal infested. The letter informed her that the building must either be brought into conformance with the building code or be demolished. In addition, she was informed that repair work could not commence until the building had undergone an inspection and the proper permits were obtained. Further correspondence between the Village and the property owners ensued. Eventually, when no permits were sought, the

Village filed a complaint for demolition.

A thorough review of the evidence reveals that the summary contained in the appellate court opinion is accurate. See 334 Ill. App. 3d at 491-98. The circuit court found the building unsafe and dangerous, based on testimony regarding the risk of communicable disease evidenced by animal droppings, the presence of methane gas, potential contamination of the Village's water supply, and structurally weak ceiling rafters. The circuit court also found that the value of the building was approximately $100,000; the cost of repair would be approximately $75,000; and such an expenditure would constitute "substantial renovation" of the building. The circuit court entered an order of demolition.

On appeal, the property owners argued that section 11-31-1 of the Code, which permits demolition of "dangerous and unsafe buildings or uncompleted and abandoned buildings" (65 ILCS 5/11-31-1(a) (West 1996)), violates the due process guarantees of both the United States and Illinois Constitutions (U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, §§ 2, 15). Specifically, they contended that ordering demolition upon a finding that the building is dangerous and unsafe, without first allowing the property owner to repair the property, constitutes an unlawful taking without due process and without just compensation.

The appellate court held the statute unconstitutional "because it authorizes a municipality to take private property without compensation and without due process by demolishing or requiring demolition without first giving the owner the choices of repairing the property within a reasonable time and of spending whatever it costs to bring the property into compliance." 334 Ill. App. 3d at 503-04. The appellate court agreed with the property owners that, absent an "imminent threat to the safety of persons or property" (334 Ill. App. 3d at 502), they should have been afforded reasonable time *after* the

circuit court's finding that the structure was dangerous and unsafe in which to make the necessary repairs. Further, the property owners argued, and the appellate court agreed, that whether the building was suitable for repair was the owners' decision, not a question to be answered by the court. In effect, the statute unconstitutionally denies them "the opportunity of doing whatever is necessary" to repair the building "at whatever cost" they are willing to spend. 334 Ill. App. 3d at 503.

As appellant, the Village make five arguments to this court: (1) the property owners' constitutional challenge should not be heard because they failed to comply with Supreme Court Rule 19 (134 Ill. 2d R. 19); (2) the property owners lack standing to raise the constitutional challenge; (3) section 11-31-1 does not violate due process; (4) even if the statute is found to violate due process, the appellate court's ruling is internally inconsistent and overbroad and should be corrected by this court; and, finally, (5) the order for demolition should stand because the structure at issue in this case cannot possibly be brought into conformance with current zoning requirements.

Pursuant to Supreme Court Rule 345 (155 Ill. 2d R. 345), we have permitted the City of Chicago and the Illinois Municipal League to file a brief *amicus curiae*. *Amici* argue that section 11-31-1 is a constitutionally permissible exercise of municipal police power.

COMPLIANCE WITH RULE 19

The property owners first raised the constitutional issue in their April 14, 1998, motion to dismiss the Village's complaint for demolition. The record does not contain the Village's response to the motion to dismiss. However, the record does contain the property owners' reply to that response, which does not mention a Rule 19 objection having been made. Thus, it appears that the Village did not invoke Rule 19 in the trial court.

The property owners raised the constitutional issue again on appeal and the Village responded that the constitutional claim was barred for failure to comply with Rule 19. Thereafter, the property owners sought leave from the appellate court to comply with Rule 19. The appellate court granted leave to comply on February 15, 2001. On February 26, 2001, the property owners filed notice in the appellate court that they had given notice to the Attorney General of their constitutional challenge to a state statute, as required by Rule 19. The Attorney General responded by letter, advising the property owners that he declined to intervene in the matter. A copy of the letter was filed with the appellate court on March 16, 2001. In the end, the appellate court declined to address the constitutional challenge to the statute based on its factual finding that the property owners had the opportunity to choose whether to repair or demolish their building prior to the Village's demand for demolition. *Village of Lake Villa v. Stokovich*, No. 2-00-0943 (2001) (unpublished order under Supreme Court Rule 23).

The property owners then filed a petition for leave to appeal, which this court denied on February 6, 2002. However, this court entered a supervisory order directing the appellate court to vacate its affirmance of the demolition order and to address the property owners' claim that section 11-13-1 is unconstitutional. *Village of Lake Villa v. Stokovich*, 198 Ill. 2d 593 (2002) (supervisory order).

When the Village again argued to the appellate court that the property owners' constitutional claim was barred by failure to comply with Rule 19, the appellate court concluded that because the property owners had, by that time, complied with Rule 19, their constitutional claim was not barred. 334 Ill. App. 3d at 499. The appellate court eventually held that section 11-31-1 is unconstitutional and this court granted the Village's petition for leave to appeal. Before this court, the Village again

asserts that the matter was not properly before the appellate court due to the property owners' failure to satisfy the requirements of Rule 19, and, thus, should not be considered by this court.

This court has never before had occasion to address the effect of noncompliance, or delayed compliance, with Supreme Court Rule 19. Under this rule, a litigant challenging the constitutionality of a statute, ordinance, or administrative regulation must serve notice of the challenge upon the Attorney General or other affected agency or officer. 134 Ill. 2d R. 19(a). "The notice shall identify the particular statute *** and shall briefly describe the nature of the constitutional challenge." 134 Ill. 2d R. 19(b). The rule also contains a timing requirement: "The notice shall be served at the time of suit, answer or counterclaim, if constitutionality is raised at that level, or promptly after the constitutional question arises as a result of a circuit or reviewing court ruling or judgment." 134 Ill. 2d R. 19(b). The purpose of the notice is to give the affected agency or officer the opportunity to intervene in the proceeding for the purpose of defending the constitutionality of the statute, ordinance, or administrative regulation. 134 Ill. 2d R. 19(c). Because the property owners did eventually comply with Rule 19, and because no issue is raised as to the content of the notice, the Village's claim must be understood to be based on the timing of the notice.

The Village claims that its due process rights were violated when the appellate court granted leave to the property owners to comply with Rule 19 after the Village had already filed its brief. The Village does not explain how its due process rights were violated and the case it cites as support, *Delarosa v. Approved Auto Sales, Inc.*, 332 Ill. App. 3d 623 (2002), is not relevant. The underlying issue in *Delarosa* was a contract dispute between a used-car buyer and a car dealer. The appellate court found that the buyer's due process rights were violated

when the trial court, after first denying his motion to amend his pleadings to include a breach of contract claim, reversed itself after he had rested his case and then entered a directed judgment for the dealer. *Delarosa*, 332 Ill. App. 3d at 626. Because the buyer prepared for and conducted the trial with the understanding that his contract claim was not going to be allowed, the court's untimely reversal of its earlier erroneous decision resulted in a violation of his due process rights. *Delarosa*, 332 Ill. App. 3d at 626. In contrast, the Village has not demonstrated that it was prejudiced in any way by the timing of the property owners' compliance with Rule 19. The Village had long been aware of the property owners' constitutional claim and did not seek leave to supplement its brief after learning that the Attorney General had been given notice and declined to intervene. Thus, it was not prejudiced in its effort to respond to the constitutional challenge. In addition, the appellate court did not reach the constitutional issue until ordered to do so by this court, long after the appellate court allowed the property owners to comply with Rule 19. The Village had ample opportunity to address the constitutional issue before the appellate court.

Nevertheless, the Village correctly observes that strict compliance with supreme court rules is generally required: "The rules of court we have promulgated are not aspirational. They are not suggestions. They have the force of law, and the presumption must be that they will be obeyed and enforced as written." *Bright v. Dicke*, 166 Ill. 2d 204, 210 (1995). See also *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490 (2002) (requiring strict compliance with the affidavit requirement of Rule 315(b)).

In their motion for leave to serve late notice, the property owners acknowledged their failure to serve notice on the Attorney General at the time they first raised the constitutional question in their motion to dismiss. They

explained that they had understood the requirement of notice to the "affected agency" (134 Ill. 2d R. 19(b)) to be fulfilled because the municipality was already party to the suit. Rule 19, however, has generally been understood to require notice to the Attorney General whenever the constitutionality of a state statute is challenged. See, *e.g.*, *Poullette v. Silverstein*, 328 Ill. App. 3d 791, 796 (2002) (Rule 19 requires "that notice be given to the Attorney General by any party questioning the constitutionality of a state statute in a proceeding where the Attorney General is not already a party"). The appellate court accepted the property owners' explanation and granted them leave to serve late notice. The question presented to this court is, therefore, whether the appellate court has the discretion to permit such a deviation from the clear requirements of Rule 19. Rule 19 was adopted in 1986. Shortly thereafter, this court commented on the purpose of the rule:

"This rule recognizes the significance of the State's interest in defending the constitutionality of its laws by requiring a litigant to serve the Attorney General with notice that he intends to challenge the constitutionality of a statute. This notice, in turn, affords the Attorney General the opportunity to petition for leave to intervene in the action in the circuit court. The adoption of Rule 19 should obviate the need for the State's intervention in an action in a reviewing court in future cases." *Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc.*, 118 Ill. 2d 389, 400 (1987).

The property owners argue that it was within the discretion of the appellate court to permit late compliance with Rule 19, notwithstanding the requirement that "notice shall be served at the time of suit, answer or counterclaim, if constitutionality is raised at that level." 134 Ill. 2d R. 19(b). They cite *McMichael v. Michael Reese Health Plan Foundation*, 259 Ill. App. 3d 113 (1994), in which the defendant, Health Plan, did not comply with Rule 19 until after

it had raised a constitutional challenge to a statute on appeal. The appellate court rejected plaintiff's argument that compliance with Rule 19 is jurisdictional. *McMichael*, 259 Ill. App. 3d at 115. However, as the Village correctly observes, the discussion of Rule 19 in *McMichael* was *dicta*, because the appellate court resolved the matter without reaching the constitutional question.

The property owners also rely on the more recent decision in *Poullette*, where the plaintiff raised a constitutional question regarding a provision of the Code of Civil Procedure for the first time on appeal. The defendant argued that the constitutional claim was waived for failure to raise it before the trial court and that the plaintiff had also failed to comply with Rule 19. *Poullette*, 328 Ill. App. 3d at 796. The appellate court chose to address the constitutional question, notwithstanding failure to notify the Attorney General, because the issue was of constitutional dimension and had been fully briefed and argued by the parties. *Poullette*, 328 Ill. App. 3d at 797. In the end, the appellate court found the challenged statute constitutional. *Poullette*, 328 Ill. App. 3d at 797.

The Village offers several cases in which the appellate court has found failure to comply with Rule 19 to be the equivalent of waiver. See *Villareal v. Peebles*, 299 Ill. App. 3d 556, 561 (1998) (failure to raise constitutional issue in trial court and late compliance with Rule 19 not excused); *Serafin v. Seith*, 284 Ill. App. 3d 577, 587 (1996) (issue waived for failure to comply with Rule 19; "[m]oreover," the constitutional argument was "without merit"); *Witt v. Jones & Jones Law Offices, P.C.*, 269 Ill. App. 3d 540, 545 (1995) (constitutional arguments waived for failure to raise them in trial court and failure to comply with Rule 19; "[f]urther," the constitutional arguments were "without merit").

We conclude that a party's failure to timely comply with Rule 19 does not deprive the court of jurisdiction to consider the constitutional issue. However, failure to strictly comply with

the rule may result in waiver. Nevertheless, because waiver is a limitation on the parties, not on the court (*Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 518-19 (2000)), a circuit court or the appellate court has the discretion to permit late compliance with Rule 19 and thereafter to address the constitutional issue if the purpose of the rule has been served. See, *e.g.*, *Pappas v. Calumet City Municipal Officers' Electoral Board*, 288 Ill. App. 3d 787, 791 (1997) (declining to address constitutional challenge to state statute where challenging party had not served appropriate notice on Attorney General and did "not seek leave to do so on appeal," because the Attorney General had not been afforded "the opportunity for meaningful participation").

In the present case, the appellate court did not abuse its discretion by permitting late compliance with Rule 19. The purpose of Rule 19 was fulfilled when the Attorney General was offered and declined an opportunity to participate. Indeed, when this court issued the supervisory order directing the appellate court to consider the constitutional claim, it was already a matter of record that the Attorney General had not objected to receiving late notice and was not interested in intervening to defend the constitutionality of section 11-31-1.

DEFENDANTS' STANDING TO RAISE CONSTITUTIONAL CLAIM

"The doctrine of standing is intended to assure that issues are raised only by those parties with a real interest in the outcome of the controversy. [Citation.] To have standing to challenge the constitutionality of a statute, one must have sustained or be in immediate danger of sustaining a direct injury as a result of enforcement of the challenged statute. [Citation.] The claimed injury must be (1) distinct and palpable; (2) fairly traceable to defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief.

[Citations.]" *Chicago Teachers Union, Local 1 v. Board of Education of the City of Chicago*, 189 Ill. 2d 200, 206-07 (2000).

The Village asserts that because the property owners had ample opportunity to repair the structure prior to the entry of the demolition order, they have not been harmed by the alleged defect in the statute, and, therefore, they lack standing to attack the constitutionality of section 11-31-1.

The property owners claim that they were not obliged to repair or demolish the structure until after the matter was adjudicated and the structure found to be dangerous and unsafe. Thus, they argue, they were entitled to a reasonable amount of time after the Village's allegations were proven in which to determine whether they were willing to invest the amount of money that would be required and, in addition, a reasonable amount of time to make the repairs if they chose to do so. Because the statute does not provide for such an opportunity to repair *after* the entry of the demolition order, they contend the statute denies them due process.

We conclude that the property owners do have standing to raise the claim that a property owner is constitutionally entitled to the opportunity to decide whether to make repairs and to a reasonable amount of time to do so after an adjudication that the structure is dangerous and unsafe. Indeed, such a claim could be made only by a property owner who has resisted initiating repairs until after the circuit court has ruled on the merits and who, as a result, is in immediate danger of having his building demolished. The property owners have demonstrated they are in immediate danger of sustaining a palpable injury, fairly traceable to the Village's actions, which will be remedied if this court grants the relief sought. See *Chicago Teachers Union*, 189 Ill. 2d at 206-07.

The Village makes a separate, but related, argument that the property owners have waived any challenge to the

constitutionality of the statute because they "did not ask [the circuit court] for the relief they now say they were denied." Not only did they fail to undertake repairs after they first received notice from the Village of the need to do so, they neither undertook repairs during the pendency of the litigation, nor sought a stay either before or after the circuit court entered the order of demolition. Thus, the Village argues, they may not argue on appeal that they were denied the opportunity, after the building was ruled dangerous and unsafe, to decide whether they were willing to spend whatever it would take to save the structure from demolition. The Village cites *Western Casualty & Surety Co. v. Brochu*, 105 Ill. 2d 486, 500 (1985), in which this court stated that it is "axiomatic that questions not raised in the trial court are deemed waived and may not be raised for the first time on appeal."

Even if the property owners' failure to request the opportunity to which they claim they are constitutionally entitled constitutes waiver of this claim, the rule of waiver serves as a limitation on the parties and not on the court. This court "is not precluded from considering issues not properly preserved by the parties, and indeed has 'the responsibility *** for a just result and for the maintenance of a sound and uniform body of precedent [that] may sometimes override the considerations of waiver that stem from the adversary character of our system.' " *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 251 (1994), quoting *Hux v. Raben*, 38 Ill. 2d 223, 225 (1967). Because the appellate court addressed the constitutional question pursuant to a supervisory order of this court directing it to do so, we choose to address the issue on its merits.

CONSTITUTIONALITY OF SECTION 11-31-1

The constitutionality of a statute is a question of law and is, thus, reviewed *de novo*. *Miller v. Rosenberg*, 196 Ill. 2d 50,

57 (2001). In general, statutes carry a strong presumption of constitutionality (*People ex rel. Ryan v. The World Church of the Creator*, 198 Ill. 2d 115, 120 (2001)), and the party challenging the statute has the burden of rebutting that presumption (*Russell v. Department of Natural Resources*, 183 Ill. 2d 434, 441 (1998)). In addition, this court has a duty to uphold the constitutionality of a statute if it is reasonably possible to do so. *City of Chicago v. Morales*, 177 Ill. 2d 440, 448 (1997).

When the basis of the constitutional challenge is an alleged violation of the due process clauses of the state or federal constitutions, the court will ordinarily apply the rational basis test, under which the statute will be upheld if it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor discriminatory. *Tully v. Edgar*, 171 Ill. 2d 297, 304 (1996). If, however, the challenged legislation implicates a fundamental right, the presumption of constitutionality is weaker, and far more demanding scrutiny is required. *Tully*, 171 Ill. 2d at 304. Under the strict scrutiny standard, a statute violates due process unless it is narrowly tailored to serve a compelling state interest. *Tully*, 171 Ill. 2d at 304-05.

The appellate court applied strict scrutiny in the present case, citing *Tully* for the proposition that "where the right infringed upon is among those considered a 'fundamental' constitutional right, *such as a property right*, courts subject the statute to 'strict scrutiny.' " (Emphasis added.) 334 Ill. App. 3d at 500-01, citing *Tully*, 171 Ill. 2d at 304. The fundamental constitutional right at stake in *Tully*, however, was the right to vote.

The Village argues for application of the rational basis test because "there is no fundamental right to allow a building to become in such disrepair as to become dangerous." Therefore, the Village asserts, section 11-31-1 is a valid

exercise of the state's police power, citing *City of Carbondale v. Brewster*, 78 Ill. 2d 111 (1979). In *City of Carbondale*, this court found an ordinance that required owners or occupants to remove snow and ice from sidewalks abutting their properties to be a valid exercise of the city's police power because it was a reasonable means to further a legitimate state interest. *City of Carbondale*, 78 Ill. 2d at 117-18.

Amici have also argued that once the trial court made a finding that the property was dangerous and unsafe, the Village's police power came into play and that review of the exercise of that power should be conducted under a rational basis standard, citing *Camara v. Municipal Court*, 387 U.S. 535, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967), and other cases in which the United States Supreme Court and federal courts of appeals have applied the rational basis test to the exercise of police power affecting interests in real property. *Amici* liken the state's power to demolish dangerous and unsafe structures to the killing of diseased livestock and the burning of infected plants, both of which are "time-honored use[s] of a state's police power," quoting *McKenzie v. City of Chicago*, 118 F.3d 552, 557 (7th Cir. 1997).

The property owners acknowledge that although "property" is specifically referred to in the due process clauses of both the state and federal constitutions, not all property rights are deemed fundamental. See *People v. Lindner*, 127 Ill. 2d 174, 184 (1989) (recognizing that possession of a driver's license is a nonfundamental property interest and applying the rational basis test to invalidate a statute mandating revocation of a driver's license upon conviction of certain offenses). They argue, however, that the property interest at issue here is fundamental because it involves real property and, thus, the statute is deserving of strict scrutiny. They also rely on *Hanna v. City of Chicago*, 331 Ill. App. 3d 295 (2002), in which our appellate court held that a facial challenge to the

constitutionality of a zoning ordinance is governed by the more stringent "substantial relationship" test, rather than by the rational basis test.

In *City of Aurora v. Meyer*, the property owner challenged the constitutionality of this section, claiming that it "purports to authorize the city to take private property without just compensation and without due process of law." *City of Aurora v. Meyer*, 38 Ill. 2d 131, 132 (1967). Because this court resolved the issue in the property owner's favor as a matter of statutory interpretation, it was not necessary to reach the constitutional question. As a result, we have not yet had occasion to determine whether strict scrutiny is required or whether rational basis review of section 11-31-1 will suffice.

This court has long acknowledged that "[e]very owner has a right to use his property in his own way and for his own purposes, subject only to the restraint necessary to secure the common welfare. This is both a liberty and a property right." *Northern Trust Co. v. City of Chicago*, 4 Ill. 2d 432, 437 (1954). The phrase "restraint necessary to secure the common welfare" refers to the police power of the state under which the state "may act to regulate, restrain or prohibit that which is harmful to the public welfare even though the regulation, restraint or prohibition might interfere with the liberty or property of an individual." *Chicago National League Ball Club, Inc. v. Thompson*, 108 Ill. 2d 357, 368 (1985). In *Chicago National League Ball Club*, this court applied the rational basis test to a statute and ordinance, enacted pursuant to the police power, that had the effect of prohibiting nighttime athletic events at Wrigley Field in Chicago. The challenged provisions were intended to abate a public nuisance-the "intolerable noise" created by nighttime sporting events. *Chicago National League Ball Club*, 108 Ill. 2d at 364. We found the statute and the ordinance constitutional. *Chicago National League Ball Club*, 108 Ill. 2d at 372.

Similarly, we applied the rational basis test to legislation regulating land use in *Beverly Bank v. Illinois Department of Transportation*, 144 Ill. 2d 210 (1991). The challenged statute, which we found constitutional, prohibited new residential construction on a flood plain. The legislative purpose of this exercise of the police power was to reduce the potential for flood damage, to protect the health and welfare of residents, and to reduce the need for emergency relief services. *Beverly Bank*, 144 Ill. 2d at 226.

Section 11-31-1 of the Code is in some respects similar to the statute and ordinance at issue in *Chicago National League Baseball Club*. That is, its purpose is to abate a public nuisance. And, like the statute at issue in *Beverly Bank*, section 11-31-1 interferes with a property owner's ability to choose how he would use his land. We agree with the Village that a property owner does not have a fundamental right to permit his property to fall into such disrepair as to create a risk to the health and safety of the public. We conclude that, like the statutes at issue in *Chicago National League Baseball Club* and *Beverly Bank*, section 11-31-1 was enacted pursuant to the state's police power and is, therefore, subject to review under a rational basis standard and, therefore, the property owners have the burden of overcoming the presumption of constitutionality.

In applying the rational basis test, we must first consider whether the public interest the statute is intended to serve is a legitimate interest, then determine whether the statute bears a rational relationship to that interest, and, finally, determine whether the method chosen by the legislature to protect or further that interest is reasonable. *Arangold v. Zehnder*, 204 Ill. 2d 142, 147 (2003). Rational basis review is highly deferential to the judgments made by the legislature. *Cutinello v. Whitley*, 161 Ill. 2d 409, 421-22 (1994). Thus, we are not concerned with the wisdom of the statute or with whether it is the best means to achieve the desired result. *People v. Shephard*, 152 Ill. 2d 489,

503 (1992). So long as there is a conceivable basis for finding the statute rationally related to a legitimate state interest, the law must be upheld. *Potts v. Illinois Department of Registration & Education*, 128 Ill. 2d 322, 332 (1989). The property owners do not dispute that section 11-31-1 is intended to serve a legitimate interest. Rather, they argue that "any cost limitation on the right to repair is arbitrary and unreasonable and not rationally related to the public interest involved." They cite several cases from other jurisdictions in support of this position. The cases cited, however, do not assist us in our inquiry because, in each case, the state statute or local ordinance found unconstitutional allowed an officer of the municipality to issue an order of demolition. See, *e.g.*, *Hawthorne Savings & Loan Ass'n v. City of Signal Hill*, 19 Cal. App. 4th 148, 23 Cal. Rptr. 2d 272 (1993) (before the city's planning director could order demolition, property owner was entitled to choose between repairing and demolishing buildings, and reasonable time to make repairs if owner chose to do so); *Shaffer v. City of Atlanta*, 223 Ga. 249, 154 S.E.2d 241 (1967) (municipal officials denied property owner due process by ordering him to demolish building and denying him building permits to repair the alleged defects before giving him a hearing); *Horne v. City of Cordele*, 140 Ga. App. 127, 230 S.E.2d 333 (1976) (ordinance permitting city director of community development to order demolition of structure if unfit for human habitation and cost of repair would exceed 50% of value found unconstitutional; owner entitled to opportunity to repair); *Washington v. City of Winchester*, 861 S.W.2d 125 (Ky. App. 1993) (city inspector may not order demolition of building based on finding that cost of necessary repairs would exceed 100% of current value of structure before giving owner the opportunity to repair the building); *Horton v. Gulledge*, 277 N.C. 353, 177 S.E.2d 885 (1970) (city's inspector of buildings may not order demolition of dwelling based on his determination that building is unfit for human habitation and

cannot be brought up to standard without repairs costing in excess of 60% of present value), *overruled on other grounds*, *State v. Jones*, 350 N.C. 520, 290 S.E.2d 675 (1982); *Herrit v. Code Management Appeal Board*, 704 A.2d 186 (Pa. Commw. 1997) (ordinance that permits city solicitor to order owner to completely raze building within 60 days if the cost of repair would exceed 100% of current value unconstitutional; owner is entitled to notice and opportunity to repair regardless of cost).

Under section 11-31-1, however, an order of demolition may not be issued by a municipal official. Instead, the municipality must give at least 15 days notice to the property owner of the need to "put the building in a safe condition or to demolish it." 65 ILCS 5/11-31-1(a) (West 1996). Only after such notice has been given may the municipal authorities apply to the circuit court for an order of demolition. In that proceeding, the burden of proof is on the municipality as petitioner to prove that the building is "dangerous and unsafe" or "uncompleted and abandoned." Only after meeting that burden may the municipality be authorized to "demolish, repair, or enclose or cause the demolition, repair, or enclosure" of such a building (65 ILCS 5/11-31-1(a) (West 1996)). Whether demolition is appropriate is governed by our decision in *City of Aurora*.

In *City of Aurora*, we noted that section 11-31-1 provides for repair or demolition in the alternative and, thus, "contemplates repair where feasible and demolition where the state of deterioration is such that repairs would amount to a substantial reconstruction." *City of Aurora*, 38 Ill. 2d at 136. Even after the circuit court finds that the municipality has met its burden of proving the structure dangerous and unsafe, the court still may not order demolition unless substantial reconstruction would be necessary to correct the defects. *City of Aurora*, 38 Ill. 2d at 137. If the court finds that the defects may readily be remedied, "demolition should not be ordered without

giving the owners a reasonable opportunity to make the repairs." *City of Aurora*, 38 Ill. 2d at 137. In contrast, if the structure is "beyond reasonable repair," the court may authorize "the extreme remedy of demolition." *City of Aurora*, 38 Ill. 2d at 137. Under these rules, evidence proffered by the property owner relating to the cost of repair must be considered by the court before authorizing demolition. *City of Aurora*, 38 Ill. 2d at 137.

Next, we must consider whether section 11-31-1, as construed in *City of Aurora*, bears a rational relationship to the legitimate state interest. The property owners claim that any consideration by the court of the cost of repairs is not rationally related to the public interest served by the statute. That is, they contend that after an adjudication that a building is dangerous and unsafe, a property owner must be given an opportunity to repair, regardless of cost. As noted above, the rational basis test is highly deferential to the judgments made by the legislature. We are not concerned with whether it would have been wiser for the legislature to enact a statute that contained a provision for an additional opportunity to repair after the circuit court finds the structure dangerous and unsafe, but before the wrecking ball swings. So long as there is a conceivable basis for finding the statute rationally related to a legitimate state interest, the law must be upheld. *Potts v. Illinois Department of Registration & Education*, 128 Ill. 2d 322, 332 (1989).

We conclude that section 11-31-1, as construed by *City of Aurora*, is rationally related to the public interest in health and safety. Without a doubt, the demolition of a structure that is dangerous and unsafe, when it has been demonstrated that the structure is not readily repairable, is rationally related to the legitimate state interest in public health and safety. In addition, the state has a legitimate interest in seeing such structures demolished sooner rather than later. See, *e.g.*, *City of Chicago v. General Realty Corp.*, 133 Ill. App. 2d 662, 667 (1971) (the

legislative policy underlying section 11-31-1 is "the expeditious protection of the public from the dangers of unsafe buildings"). Moreover, the statute as applied in this case is rationally related to the public interest in health and safety. When there is a threat of release of methane gas, of contamination of the water supply, and the building provides a habitat for mice and other vermin that pose a risk of communicable disease, as the circuit court found, then demolition is reasonable provided that the building is not readily repairable.

Finally, we must determine whether the method chosen by the legislature to protect or further that interest is reasonable. The property owners argue that section 11-31-1, even with the inquiry into the cost of repair mandated by *City of Aurora*, is arbitrary and unreasonable. They characterize the 15-day notice period as "risibly short" and insist that any consideration of the ratio between the cost of repair and the present value of the building deprives them of the opportunity to choose to spend as much as they are willing to repair it.

The statute provides procedural due process by means of written notice and a trial on the merits before the circuit court. Although the notice period is only 15 days, these property owners have not suggested that they were hampered in any way by the rather short statutory minimum period of notice. Indeed, months passed between the initial notice and the Village's filing of the petition for demolition.

The statutory framework chosen by the legislature is entirely reasonable and protects the rights of the property owner while permitting the municipality to deal expeditiously with threats to the public health and safety. Section 11-31-1 makes a reasonable distinction between properties that are readily repairable and those that are not. The statute guarantees a property owner the opportunity to make repairs, either before or after an adjudication of "dangerous and unsafe," if the property is readily repairable. If, however, the property is in need of

substantial reconstruction to render it safe, a property owner who is willing to undertake such a project must obtain the necessary permits and undertake repairs promptly upon receiving notice. The owner of such a property who does not promptly undertake repairs, but instead chooses to contest whether the building is dangerous and unsafe and to litigate the question of whether the building is readily repairable, runs the risk that he will lose on the merits and an order of demolition will issue.

The property owners have also challenged section 11-31-1 as violating the takings clause of the United States Constitution and section 15 of the Bill of Rights of the Illinois Constitution. U.S. Const., amend. V; Ill. Const. 1970, art. I, §15. As *amici* have ably pointed out, an exercise of police power to prevent a property owner from using his property so as to create a nuisance or a risk of harm to others is not a "taking" in the constitutional sense. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030, 120 L. Ed. 2d 798, 822, 112 S. Ct. 2886, 2901 (1992). We, therefore, need not consider the takings claim any further.

THE CIRCUIT COURT'S APPLICATION OF SECTION 11-31-1

Having found that section 11-31-1 as construed in *City of Aurora* is constitutional, we review the circuit court's decision to issue a demolition order. Section 11-31-1 requires two findings before an order of demolition may issue. The court must find that the building is dangerous and unsafe. *City of Aurora*, 38 Ill. 2d at 133. The court must also find that the building is beyond reasonable repair. *City of Aurora*, 38 Ill. 2d at 137. We review the court's findings to ensure that they are supported by the evidence and that they are not against the manifest weight of the evidence. *City of Chicago v. Birnbaum*, 49 Ill. 2d 250, 254 (1971). After a thorough review of the

record, we conclude that the circuit court's finding that the building is beyond reasonable repair was not supported by the evidence.

City of Aurora requires that the second finding-that the building is beyond reasonable repair-must be based on a comparison of the cost of repair with the value of the building. *City of Aurora*, 38 Ill. 2d at 135-36. In *City of Aurora*, the circuit court refused to admit evidence that the building had a value of $15,000 and that repairs would cost $500. *City of Aurora*, 38 Ill. 2d at 135. We held that section 11-31-1 contemplates repair when it is feasible. *City of Aurora*, 38 Ill. 2d at 136. Therefore evidence comparing repair cost to value should have been admitted. *City of Aurora*, 38 Ill. 2d at 137. There should have been "proof of the extent or proportion of its value to which the building had deteriorated." *City of Aurora*, 38 Ill. 2d at 135. The gist of *City of Aurora* is that demolition is justified only if repair makes so little economic sense that it is unlikely that an owner would make use of any further opportunity to repair. Because knowledge of the current value of the building is necessary to determine whether repair makes economic sense, *City of Aurora* requires that a court find current value before it may issue a demolition order.

In this case, the circuit court found that the cost of repair would be $75,000. The court further found that the value of the building was $100,000. The court's sole evidence of the value of the building was testimony that the property (including, presumably, the land) was sold some 20 years prior to the hearing by Mrs. Dorothy Stokovich to her son Nick Stokovich.

We have said that, "It goes without saying that a *contemporaneous* sale between parties dealing at *arms length* is not only relevant to the question of fair cash market value, [citations] but would be practically conclusive ***." (Emphases added.) *People ex rel. Korzen v. Belt Ry. Co. of Chicago*, 37 Ill. 2d 158, 161 (1967). The converse should also go without

saying: if a sale is remote in time, or is not an arm's length transaction, it is little evidence of market value. We have never had occasion to rule on whether a sale that occurred as long as 20 years prior to the valuation date would be admissible to prove the value of real estate. *Cf. Forest Preserve District of Cook County v. Krol*, 12 Ill. 2d 139, 146-47 (1957) (finding a sale nearly three years prior to valuation date not too remote to be admissible in a condemnation proceeding). There is no doubt, however, that even if the evidence of the 20-year-old sale was admissible it could not, by itself, support the court's finding of value. When defendants' counsel objected to the court's use of a 20-year-old sale, the court made a remark implying that any increase in market value over that time had been negated by the fact that the property was not well kept. However, we find nothing in the record to show that depreciation due to poor maintenance must have negated any appreciation over time.

Not only was the sale of the property from Mrs. Stokovich to her son too remote in time to support the court's valuation, Mrs. Stokovich's uncontradicted testimony also indicates that the sale was not an arm's length transaction. She testified that there was no agreement in writing, that her son had not yet paid $75,000 of the agreed price of $100,000, and that she simply trusted him to pay the balance when he could. Because the sale from mother to son was both remote in time and not an arm's length transaction, we conclude that the court's evidence of the value of the property was insufficient as a matter of law. Because *City of Aurora* requires that a finding that a building is beyond reasonable repair must be based on a comparison of value with cost of repair, the court's finding that the building was beyond reasonable repair was not supported by the evidence. The court thus lacked the basis that section 11-31-1 requires for an order of demolition to issue. We vacate the order of demolition and remand for further proceedings.

In the interest of judicial economy we address the

following issues to aid the court on remand. First, we review the court's finding that the building was dangerous and unsafe. There was testimony by Jennifer Schaefer, a sanitarian, that in 1998 there were mouse feces throughout the building, as well as feces of some larger mammal, not a dog, at two places in the building. Schaefer also testified that in May of 2000, shortly before the hearing, she saw gaps in the building through which vermin could enter. She stated that the amount of feces suggested "numerous" mice, that mice are known to carry disease, and that mice would go out into the surrounding area in search of food if none were available in the building. Schaefer was only one of several witnesses who described ways in which the building may threaten public health and safety. Based on the testimony, the finder of fact could conclude that the building is a threat to public health. We find that the evidence was sufficient to support the finding that the building is dangerous and unsafe.

Furthermore, the defendants have not met the burden of showing that a finding supported by evidence was nevertheless against the manifest weight of the evidence. The record indicates that the building was still vacant at the time of the hearing, and the record evidence did not establish that this vacant building was being kept reasonably free of vermin and in a generally safe condition. We conclude that the court's finding that the building was dangerous and unsafe was not against the manifest weight of the evidence. Therefore, the circuit court on remand, if the issue arises, should only consider evidence that the building's condition has changed since the first hearing. In the absence of such evidence, the court may rely on its prior finding that the building is dangerous and unsafe.

Second, we note that the court refused to admit defendants' proffered evidence of the current value of the property by a licensed real estate agent who had recently sold property in Lake Villa and about recent offers to purchase the

property. A witness who is familiar with the property at issue and has direct knowledge of real estate values in the vicinity is competent to offer an opinion about value. *Forest Preserve District of Cook County v. Krol*, 12 Ill. 2d 139, 147 (1957). Furthermore, *bona fide* offers to purchase property for cash, in the absence of evidence of comparable sales, are some evidence of fair cash market value. *City of Chicago v. Anthony*, 136 Ill. 2d 169, 188 (1990), citing *Department of Public Works & Buildings v. Lambert*, 411 Ill. 183, 191 (1952).

Finally, we point out that as the plaintiff the Village bears the burden of coming forward with sufficient evidence to support each of the findings necessary for an order of demolition.

CONCLUSION

Having held that section 11-31-1, as construed in *City of Aurora*, is constitutional, we further hold that the circuit court's decision to issue an order of demolition was not supported by the evidence. We therefore vacate the order of the circuit court and remand the cause to that court for further proceedings.

In the interest of judicial economy, we have reviewed the circuit court's finding that the building is dangerous and unsafe. We have reviewed the evidence of record, including evidence that the building was vacant, that it was infested by mice, and the lack of evidence that it was being kept reasonably free of mice and other vermin at the time of the hearing. The record also includes evidence of the possible buildup of methane gas, possible contamination of the Village water supply, and photographs that depict the generally dilapidated condition of the building. Based on all the evidence, we have affirmed the finding of dangerous and unsafe. We therefore instruct the circuit court that it should only consider evidence that the condition of the building has changed since the first

hearing. In the absence of such evidence, the court may rely on its previous finding that the building is dangerous and unsafe.

Because of our disposition, we need not address the Village's argument that the appellate court's ruling was inconsistent or overly broad. Nor do we address the Village's argument that the building cannot be repaired because it cannot be brought into compliance with current zoning regulations. Questions regarding the effect of zoning on this dispute were mentioned but never squarely raised and litigated in the circuit court. Therefore the Village's zoning argument is not properly before us.

The judgment of the appellate court is reversed, the judgment of the circuit court is vacated, and the cause is remanded to the circuit court for further proceedings.

Appellate court judgment reversed;
circuit court order vacated;
cause remanded.

JUSTICE FREEMAN, concurring in part and dissenting in part:

I agree with the majority that the failure of the property owners to timely comply with Supreme Court Rule 19 (134 Ill. 2d R. 19) does not deprive the court of jurisdiction to consider the constitutional challenge to section 11-31-1 of the Illinois Municipal Code (65 ILCS 5/11-31-1(a) (West 1996)). I also agree with the majority that the property owners have standing to challenge the constitutionality of section 11-31-1, but their challenge fails because the statute is rationally related to the public interest in health and safety. Lastly, I agree with the majority that the cause must be remanded because the circuit court lacked the evidentiary basis for entry of an order of demolition pursuant to section 11-31-1. I part company with the majority, however, because the majority gives its imprimatur to other findings of the circuit court which likewise lack

evidentiary support in the record. The majority's error is all the more lamentable because resolution of these issues is not needed in light of the remand ordered by the court.

The findings in question are that the building is dangerous and unsafe, and the cost of repair is $75,000. The majority states:

"There was testimony by Jennifer Schaefer, a sanitarian, that in 1998 there were mouse feces throughout the building, as well as feces of some larger mammal, not a dog, at two places in the building. Schaefer also testified that in May of 2000, shortly before the hearing, she saw gaps in the building through which vermin could enter. She stated that the amount of feces suggested 'numerous' mice, that mice are known to carry disease, and that mice would go out into the surrounding area in search of food if none were available in the building. Schaefer was only one of several witnesses who described ways in which the building may threaten public health and safety. Based on the testimony, the finder of fact could conclude that the building is a threat to public health. We find that the evidence was sufficient to support the finding that the building is dangerous and unsafe." Slip op. at 19.

The majority's summary of Schaefer's testimony omits her further testimony that she did not see any evidence of animal harborage in the building. Although the presence of mice droppings, endemic to public and residential buildings in the Chicago metropolitan area and cities throughout our state, is far from commendable, Schaefer's testimony supports an inference of past, not present, rodent infestation. The majority's summary of other dangers posed by the building is understandably vague since these dangers represent only potential threats to public health and safety.

Not satisfied with vague references to danger in the analysis section of the opinion, the majority advances more specific references in the conclusion section of the opinion. The

majority states: "The record also includes evidence of the possible buildup of methane gas, possible contamination of the Village water supply, and photographs that depict the generally dilapidated condition of the building." Slip op. at 20. Although more specific, these threats remain in the realm of potential dangers. As shown by the appellate court opinion upon which the majority purports to rely, the Village's plumbing inspector testified that he performed no tests to determine if methane gas was present in the building. 334 Ill. App. 3d at 494. He further testified that he did not determine whether the building's plumbing system was tied into the Village's drinking water system. Indeed, earlier testimony established that the building had not been provided water by the Village since 1989. Without information that the building's plumbing system tied into the Village's drinking water system, the circuit court could hardly determine that the building posed a danger of contamination to the Village's drinking water system. Moreover, if the building's plumbing system tied into the Village's system, the opposite conclusion would hold since there was no testimony of present contamination of the Village's water supply.

The majority also endorses the circuit court's finding that the cost of repair is $75,000. As the majority acknowledges, however, "*City of Aurora* [*v. Meyer*, 38 Ill. 2d 131 (1967),] requires that a finding that a building is beyond reasonable repair must be based on a comparison of value with cost of repair." Slip op. at 18-19. As further explained in *City of Aurora*, 38 Ill. 2d at 137, the circuit "court should find from the evidence what the specific defects are which render the building dangerous and unsafe. If they are such as may readily be remedied by repair, demolition should not be ordered without giving the owners a reasonable opportunity to make the repairs." Thus, the cost of repair is the cost necessary to correct the conditions that render the structure dangerous and unsafe.

At trial, a contractor with 10 years of experience in

"rehab" and remodeling testified that the building was safe to be in, as it was "very sound." He further testified that the property could be completely renovated into a single-family residence for a cost of between $64,000 and $75,000. In finding that the cost of repair is $75,000, the circuit court used the cost of complete renovation of the building, rather than the cost of repair of the specific defects which render the building dangerous and unsafe. The circuit court committed clear error. In light of the majority's citation to *City of Aurora* as controlling authority, the majority's endorsement of the circuit court's finding is likewise erroneous.

CONCLUSION

As the majority acknowledges, this cause must be remanded to the circuit court for further proceedings. The circuit court must obtain evidence regarding the value of the building and compare the building's value to the cost of repair of the defects that render the building dangerous and unsafe. Additionally, the majority instructs the circuit court that it may consider evidence that the condition of the building has changed since the first hearing. Slip op. at 19. Given the need for remand, the majority's review and endorsement of the circuit court's findings is particularly unwise. The circuit court's findings were purely speculative. There was simply no evidence on the cost of repair to correct the specific defects which render the building unsafe. There was simply no evidence of danger to the Village's drinking water system. There was simply no evidence regarding the buildup of methane gas in the building. This lack of evidence calls for reversal, not approval, of the circuit court's findings.

As this court has heretofore recognized, "[t]he law is well settled that in cases of this nature courts do not go further than is necessary to protect the public interest." *City of Aurora*, 38 Ill. 2d at 136. Such restraint applies not only to the circuit

court at hearing on the need for demolition, but to this court on review of the propriety of the circuit court's order. Because the majority insists on endorsing the circuit court's speculative findings, I cannot join fully in the majority opinion.

CHIEF JUSTICE McMORROW and JUSTICE KILBRIDE join in this partial concurrence and partial dissent.

No. 2--00--0943

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE VILLAGE OF LAKE VILLA, Plaintiff-Appellee, v. DOROTHY STOKOVICH, as Trustee, under Trust Agreement dated September 16, 1992, and NICK STOKOVICH, Defendants-Appellants.	) Appeal from) the Circuit Court) of Lake County.) No. 98--MR--75) Honorable) John R. Goshgarian,) Judge, Presiding.) Filed Oct 21, 2002

JUSTICE BOWMAN delivered the opinion of the court:

Defendants, Dorothy Stokovich, as trustee under a trust agreement dated September 16, 1992, and Nick Stokovich, appeal from the judgment of the circuit court of Lake County granting plaintiff, the Village of Lake Villa, judgment on counts I and III of its second amended complaint. Count I sought the demolition of a building in Lake Villa owned by defendants. Count III sought fines for violations of Title 8 of the Lake Villa Village Code (the Village Code) (Lake Villa Village Code §8--4--1 (eff. April 13, 1994)). The trial court found that the demolition order rendered moot count II, which sought alternative relief in the form of bringing the building into compliance with all current provisions of the Village Code.

On appeal defendants contend that (1) section 11--31--1 of the Illinois Municipal Code (65 ILCS 5/11-31--1 (West 1996)), pertaining to demolition by a municipality, is unconstitutional; (2) section 11-31--1 constitutes an invalid

delegation of legislative power; (3) the trial court abused its discretion in excluding defendants' evidence regarding the current value of the building; (4) the trial court abused its discretion in admitting plaintiff's opinion testimony concerning the condition of the building; (5) the trial court's finding that the building was dangerous and unsafe requiring demolition under section 11--31--1 was against the manifest weight of the evidence; (6) the trial court erred in denying defendants a jury trial on count III of the second amended complaint; (7) the ordinance violations alleged in count III of the second amended complaint did not apply to vacant structures; and (8) the trial court's judgment on count III was so deficient as to require a remand.

The property in question is a building consisting of three stories and a basement that defendant Dorothy Stokovich and her husband had acquired in 1949 and used as a nursing home until 1977. A caretaker lived in the building from 1977 until sometime in the 1980s. In 1979 or 1980 Mrs. Stokovich sold the building to her son, defendant Nick Stokovich, for $100,000 and gave him authority to make all decisions regarding the building. Nick Stokovich lived in the building for approximately 12 years until 1992. At the time of trial the building was about 100 years old.

On September 25, 1997, a red card was posted on the building indicating that it was unsafe, abandoned, dilapidated, and animal infested. On October 3, 1997, the deputy director of the Lake County building and zoning department sent Dorothy Stokovich a letter advising her that the building was in violation of plaintiff's building code for the following reason: "unsafe abandoned structure must be brought up to the present building code or demolished." The letter informed her that, before any repair work could be done, the department would have to conduct an inspection of the building and the proper permits would have to be secured. If the subject property was to be

demolished, the letter informed her, a demolition permit was required. The letter also advised Mrs. Stokovich to contact the department if she had any questions concerning the matter.

On October 17, 1997, Nick Stokovich wrote the deputy director, advising him that all future correspondence should be sent to him, as he was the owner of the building. Stokovich informed the deputy director that he was leaving town for a few weeks, that he had advised his attorney regarding the matter, and that he hoped the matter could be resolved upon his return or beforehand through his attorney.

On January 7, 1998, plaintiff's attorney wrote defendants stating that the building was in a dangerous and unsafe condition and had to be demolished within 30 days. On February 3, 1998, defendants' attorney wrote the plaintiff's attorney informing the latter that he had left a voice mail message on January 23 requesting reports plaintiff had considered concerning the condition of the subject property. Defendants' attorney asked for additional time to review the requested documents with defendants and to respond on their behalf. In response, on February 18, 1998, plaintiff's attorney filed a single-count complaint for demolition and sent a copy of the complaint, which included an inspector's report, to defendants. The inspector's report indicated that the building was unsafe, abandoned, dilapidated, and animal infested and that a red card had been posted.

Defendants filed a motion to dismiss challenging the constitutionality of section 11-31--1 of the Illinois Municipal Code (65 ILCS 5/11--31--1 (West 1996)) on which the demolition action was based. Following the denial of the motion, defendants filed another motion to dismiss, alleging that plaintiff's complaint failed to set forth specific facts to support plaintiff's conclusion that the building was unsafe. The trial court granted the motion.

Subsequently, plaintiff filed a three-count amended

complaint on August 20, 1998. Defendants moved to dismiss count III, pertaining to fines for ordinance violations, based on improper notice. The trial court granted the motion, and plaintiff filed a second amended complaint containing the same three counts but adding notice allegations.

Inspections of the property were conducted by plaintiff on June 4, 1998, and again on May 4, 2000.

At trial Jennifer Schaefer, a sanitarian with the Lake County health department, testified that on June 4, 1998, she inspected the building in question. She observed mice droppings throughout the building as well as two areas with larger feces. She did not see any evidence of animal harborage. Schaefer also walked around the exterior of the building, observing a lot of holes and openings. Schaefer stated that, because mice were known to carry diseases, she considered the amount of mice droppings to be a danger to humans. As a result, Schaefer issued a notice of violation of the Lake County health ordinance to Dorothy Stokovich, directing her to remove all feces from the property. Schaefer did not receive any communication from defendants indicating that the problem had been resolved or that any action had been taken.

On July 31, 1998, Schaefer returned to the building and from the sidewalk observed that there were still several gaps around the building where vermin could enter it. Schaefer sent a notice of violation to Dorothy Stokovich directing her to protect the building from the entrance of vermin. Schaefer never received any response to the notice.

Alice Brownlee, plaintiff's clerk, testified that she was the official records custodian for plaintiff and that the water bill ledger for the building indicated that plaintiff had not provided any water to the building since March 31, 1989.

August Hibel, chief building inspector for the Lake County building department, testified that on June 4, 1998, he spent approximately 1½ to 2 hours inspecting the interior and

exterior of the building to determine its existing condition and to ascertain any violations of the Village Code. Hibel was accompanied by six other inspectors. Photographs taken of the subject property during the inspection were admitted into evidence, as were photos taken during a subsequent inspection on May 4, 2000.

Using the photographs, Hibel described the condition of the building at the time of both inspections. Hibel recounted that there was extensive water damage throughout the building, broken windows that had been covered with plywood or cardboard, holes in the roof, some rotten rafters, mold and mildew on some walls, and exposed electrical wiring hanging on the ceiling in some of the bedrooms. Additionally, portions of the siding of the overhang were missing; the plaster was falling off the walls in some rooms; some of the gutters were peeling away from the roof; the porch was sagging; and the fire escape slide on the side of the structure was badly deteriorated. Also, there was no central heating system and no electrical power.

Hibel stated that he was familiar with the 1993 Building Officials and Code Administrators Property Maintenance Code (BOCA Code) and that the building did not comply with many of its requirements. In particular, the building did not meet the requirements for setbacks, guardrails, exterior walls, roof structure, overhang extensions, fire escapes, chimneys, window and door frames, guards for basement windows, interior stairway railings and widths, plumbing fixtures, heating systems, and exits. Hibel opined that, given the exterior condition of the building, it would be unsafe for pedestrians to walk on the sidewalk near the building because of the possibility of pieces falling off the roof or the overhang. Also, because of the lack of a heating system, electrical system, and plumbing system, no one could safely live in the building.

Hibel opined that the building was not being maintained

in a safe, sanitary, or secure condition; that it was a blight on the surrounding properties; and that it was not habitable. In Hibel's opinion a complete remodeling of both the inside and outside of the building would be necessary to make the building habitable as a single-family residence. In Hibel's opinion the amount of money it would take to repair the damage and deterioration to the building would exceed 50% of its market value. Hibel did not have an opinion as to the market value of the building.

On cross-examination, Hibel acknowledged that most of the wood in the building was "resawed" lumber and that it had greater elasticity and "sheer strength" than modern-day lumber. Hibel also acknowledged that the porch and the addition to the building, which he had noted were sagging, had their own foundations and did not share the building's foundation. He did not notice any significant sagging of the building.

Hibel was uncertain whether the sidewalk along the building was public or part of the building. He recalled that one of the other inspectors told him that the building sat on the lot line. He did not have a survey of the building nor did he ever consult a survey to determine where the lot lines were located and what the setbacks would be for the building.

As to the defects in the two chimneys of the house, Hibel made his observation regarding open mortar joints and the breaking off of bricks from outside the house at ground level. Hibel did not notice any bricks or debris from the chimneys on the ground. As to other defects he had mentioned, Hibel acknowledged that there were only two areas where the gutters were actually hanging loose off the building; that the exposed electrical wirings in some rooms did not present a safety problem since there was no electricity in the building; that the interior and exterior doors did not meet BOCA Code requirements because they stuck, had hardware missing, or were themselves missing; that the guardrails were not in compliance with the BOCA Code because the openings between the slats

were wider than the BOCA Code allowed; that none of the overhang on the front side of the structure, which faced the public sidewalk, hung over the sidewalk; and that, although he was uncertain whether the sidewalk running along the side of the house where a portion of the overhang went over the sidewalk was public, that sidewalk extended only to the back portion of the building and no farther.

It was Hibel's opinion that, regardless of whether the building was inhabited or uninhabited, it still had to be in compliance with the BOCA Code. Gary Thompson, plumbing inspector for the Lake County building department, testified that he inspected the plumbing system at the building on June 4, 1998. Thompson stated that the plumbing system was not in accordance with current plumbing code provisions and that a whole new plumbing system would need to be installed to bring it into compliance. A new waste and vents system would need to be installed as well as all new water lines and supplies. Thompson stated that parts of the plumbing system dated back to the 1930s or early 1940s. In Thompson's opinion, it would not be safe to try to salvage the existing system.

Thompson also testified that, in its present state, the plumbing system could pose a danger of contamination to the village drinking water system if there was a tie-in between the village system and the building's system because of the bacteria, mold, and mildew that would have grown into the water lines. Thompson acknowledged that he did not determine whether the building was tied into the village system.

Thompson said that, because some of the waste lines were open and because there was no water to keep the traps full, methane gas could possibly enter the building from the sewer line. According to Thompson, methane gas has no odor and if it becomes concentrated in one room it would be dangerous. Thompson admitted that he performed no tests to determine if methane gas was present. William Wiezgac, heating inspector

for the Lake County building department, who was also present at the June 4, 1998, inspection of the building, testified that the building had not been vented properly, that most of the radiators had been removed, and that the old boiler system was one that probably had been converted to an oil-burning system and then to natural gas. Wiezgac stated that he would not recommend trying to retrofit the old heating system instead of installing a new system because it would be more costly to operate the old system.

When asked if he felt it was safe to be in the building, given its existing conditions, Wiezgac replied that he felt safe walking through the building but that it was not safe to live in it at the present time.

Larry Wells, structural inspector for the Lake County building department, testified that he inspected the building on May 4, 2000. At that time the building was in a state of disrepair. In a number of areas the roof decking was deteriorated and rotted and there were some holes in the roof. Also, some of the structural members of the porch were rotted or decayed. The paint on the exterior of the building was peeling in several areas.

William Effinger, village trustee, testified that he was very familiar with the building, as his parents lived in the same block since 1950. Effinger described the building as "dilapidated" because a lot of the roofing was off, holes were in the roof, a lot of the windows were broken, fascia and soffits were falling off the flat roof area, and weeds were growing up in the soffits. A couple of years prior to trial he recalled observing raccoons going in and out of the building.

Effinger stated that he was the individual who prepared the September 25, 1997, violation notice for the building and posted the red card on it. Since that time, the property had gotten worse. Effinger acknowledged that he observed during the May 2000 inspection that some work had been done to the

building. Some of the plaster that had fallen out had been patched, some sheets of drywall had been put over holes, and a new board had been installed in a piece of fascia outside. Effinger also acknowledged that, during the past few years, he had observed individuals cutting the grass and removing brush piles.

Defendant Nick Stokovich, testifying as an adverse witness, stated that, after his mother gave him the October 3, 1997, letter from the deputy director of the Lake County building and zoning department, he wrote the deputy director explaining that he was going to be out of town and asking him to contact Stokovich's attorney. Stokovich said that he did not understand the substance of the letter. After receiving the letter, he did not apply for or obtain a demolition or building permit for the building.

Stokovich acknowledged receiving the January 7, 1998, letter from plaintiff's attorney telling him that the building must he demolished. Stokovich did not apply for and obtain a demolition permit. Nor did he make improvements to the building based on letters sent to him subsequent to the January 7 order. Stokovich testified that, after he moved out of the building in 1992, he would visit it at least once a week. Sometimes he would visit just to check the building. At other times he would work on the inside of the building. Stokovich also checked the exterior of the building during his visits. According to him, he had never noticed any roofing, fascia, soffits, or siding material on the ground. Stokovich also stated that the sidewalk running along the side of the house is private property and that, during his visits, he had never seen pedestrians on the sidewalk.

Stokovich testified that, after receiving the demolition demand in the January 7, 1998, letter, he spoke with the village mayor and some trustees, including Bill Effinger, regarding the building. Stokovich expressed his desire to repair the building

but indicated that, as long as there was a demolition demand, it made no sense to repair it.

Subsequent letters sent after plaintiff had brought suit sought repairs. Stokovich testified as to repairs he had done to the building subsequent to the January 7, 1998, letter, including repairs to the interior of the building as well as to the roof. Stokovich recalled that, when both he and a maintenance worker climbed up the escape slide, they did not notice any instability. Stokovich also testified that, during the June 1998 inspection, for which he was present, Jennifer Schaefer pointed out some mice droppings in a corner. Stokovich denied that she pointed out, nor did he observe, any larger feces. Stokovich had never seen raccoons in the building.

Stokovich stated that he had tried to keep the building secure over the past five years through locks and by boarding up some doors and windows. Stokovich was unaware of any break-ins at the building.

Stokovich considered the January 7, 1998, letter from plaintiff's attorney to be a demolition order. He acknowledged that he had never received a court order. Stokovich denied ever seeing the November 17, 1998, letter from plaintiff's attorney or the December 11, 1998, letter, which attached the November 17 letter to it, indicating the repairs defendant needed to make if he chose not to demolish the building. Plaintiff entered into evidence envelopes allegedly containing these letters and sent by certified mail that had been returned "unclaimed." Stokovich acknowledged that he had received copies of the letters from his attorney but that he did not apply for any building permit.

The testimony of Ernest Rogalla, a structural engineer testifying on behalf of defendants, was limited to the content of the report he prepared following his inspection of the building because he had inadvertently come into the courtroom during another witness's testimony. Rogalla stated that he specialized in restoration of old structures and in collapses and construction

problems of buildings. Rogalla said that his purpose in examining such structures was to determine their structural integrity, i.e., whether the structures were safe and whether they could be restored or repaired. In so doing, he performed tests.

On May 26, 1999, Rogalla spent approximately six hours inspecting the building. Rogalla examined the exterior first and then the interior. He observed no problems with the foundation surrounding the main building and porch area. His examination of the foundation while in the basement of the building revealed that the masonry walls were uncracked and undamaged. One area of the concrete portion of the basement had some surface damage, but the concrete below it was sound.

Rogalla recalled that his examination of the roof framing and the attic area revealed no defects or structural damage. Rogalla noticed some stains on the third-story walls from water leaking through the roof. There was some floor damage on the third-story floors. Rogalla discovered by cutting into areas where plaintiff had found the floors were uneven that the unevenness was related to the tiles on the floor and that the plywood underneath was in excellent shape. Rogalla stated that the entire roofing, i.e., shingles and waterproofing, needed to be repaired.

On the second-story level Rogalla found that about 500 square feet of the ceiling rafters needed repairing. On the first floor some of the ceiling rafters were soft due to moisture damage. According to Rogalla's report, several floor boards of the porch were soft and water damaged and should be repaired.

Rogalla also examined and tested more than half of the windows. Those windows operated fine. A few windows had cracks, but no whole pieces of glass were missing. Rogalla was uncertain as to whether any windows were covered with plywood or cardboard. Rogalla also examined the stairwells throughout the building which appeared sound and undamaged except for one basement stair step that teetered when walked

upon.

On cross-examination, Rogalla acknowledged that he was unaware that the building did not meet the setback requirements for the zoning district in which it is located or that the maximum height limitation for the zoning district was less than the height of the building so that removal of the third floor might be necessary to make the structure conform. Counsel for defendants objected to questions regarding these factors, stating that there had been no testimony or other evidence presented regarding these matters. The objections were overruled. Rogalla further testified that in his experience there was no reason, by virtue of "grandfathering," that any structural modifications were required for a 100-year-old building such as the one in question.

According to Rogalla, most of the building was undamaged and repair of it appeared cheaper than tearing it down and rebuilding it. In making his recommendation, Rogalla did not take into account the cost of installing plumbing or electrical and heating systems because he was only concerned with structural matters.

William Krueger testified that, during his 10 years of experience as a full-time contractor, he had done remodeling and "rehab" work including six to eight complete renovations of residences. Krueger stated that he had been present on June 4, 1998, when the county inspectors had made their inspection of the building and that he had gone through the entire building. He also rewalked the whole building in May or June 1999 to prepare an estimate for converting it into a 3-bedroom, 1½-bath, single-family residence.

Krueger described the procedure he generally followed in making an estimate. For the building in question, he first looked at the exterior of the entire structure, then went up into the attic and worked his way downward, looking at each room and walking up and down the hallway to observe what could be

salvaged and what needed removing. He also looked at the mechanical equipment in the basement such as the electrical system. Krueger considered the building safe to be in, as it was "very sound."

Krueger testified in detail as to the work to be done throughout the building to convert it into a single-family residence. Krueger estimated the total cost to be approximately $64,000, but acknowledged that it could be as high as $75,000, especially if Nick Stokovich was unable to perform certain work himself. When asked if in making his estimate he had considered that the building exceeded maximum height limitations, that the third floor might have to be removed, and that the foundation might have to be pushed back to satisfy setback requirements, Krueger replied negatively, stating that he assumed the building had been "grandfathered in."

Desko Nokitovic, a realtor with knowledge of property values in Lake Villa, testified that he was familiar with the building, as he had been personally interested in purchasing it in 1998. Nokitovic recalled that he had been through the entire building a few times, the last time late in 1998. Nokitovic had also taken an interested client through the building in 1999.

Pursuant to plaintiff's objection, Nokitovic was not allowed to testify regarding the "asking price" for the building in 1999. Also, his opinion regarding the building's current value was excluded on objection. Subsequently, defendants made an offer of proof that Nokitovic's opinion would have been that the building's market value in its present condition is $150,000 to $160,000 and that, if it were renovated into a 3-bedroom, 1½-bath home, the market value would be $230,000 to $240,000.

Defendant Nicholas Stokovich testified regarding his inspection of the exterior and interior of the building after a heavy snowfall in January 1999 and a severe hailstorm in May 2000. His inspections revealed no problems with the building,

e.g., no roofing materials, no siding, and no gutters had fallen off the building.

Stokovich stated that he possessed a real estate salesperson's license and had personally bought and sold both residential and commercial property in Lake County. He had personally renovated some of these properties. Stokovich said that he was familiar with real estate values in Lake Villa. His opinion regarding the market value of the building was excluded on objection, as was his testimony regarding any offers he had received to purchase it. Defendants then made an offer of proof regarding purchase offers Stokovich had received in 1997 and 1998 in the amount of $140,000 and $150,000, respectively.

At the conclusion of the trial the court determined, as evidenced by its comments, that the building was unsafe. In reaching its determination the court specifically mentioned Janet Schaefer's testimony regarding the possibility of communicable disease from mice droppings, Gary Thompson's testimony regarding the possibilities of methane gas in the building and of contamination of the Village's water system by defendant's water system, and Rogalla's testimony regarding the 500 square feet of ceiling rafters that needed replacement on the second story. Based on testimony regarding the price Nick Stokovich agreed to pay his mother for the building in 1979 or 1980, the trial court found that the value of the building was $100,000. Additionally, the court found that the renovation of the building into a single-family residence amounted to approximately $75,000, as testified to by defendants' witness Krueger, and that this renovation constituted "substantial reconstruction" of the building. The court entered an order of demolition. This appeal ensued.

Defendants first contend that section 11--31--1 of the Illinois Municipal Code (Code) pertaining to demolitions is unconstitutional because it does not allow a property owner the

right to repair his property. Defendant maintains that not affording a property owner the option to repair constitutes an unlawful taking without due process and without just compensation in violation of the fifth and fourteenth amendments to the United States Constitution (U.S. Const., amends. V, XIV) and sections 2 and 15 of the Bill of Rights of the Illinois Constitution (Ill. Const. 1970, art. I, §§2, 15). We review the constitutionality of a statute de novo. Miller v. Rosenberg, 196 Ill. 2d 50, 57 (2001).

Plaintiff asserts that defendants' constitutional arguments are barred by defendants' failure to comply with Supreme Court Rule 19 (134 Ill. 2d R. 19), which requires that notice be served upon the Attorney General in any cause in which the constitutionality of a statute affecting the public interest is raised. However, defendants filed in this court a motion for leave to serve notice to the Illinois Attorney General and we allowed that motion. Consequently, defendant's constitutional arguments are not barred.

The relevant portions of section 11-31--1 of the Code provide:

"(a) The corporate authorities of each municipality may demolish, repair, or enclose or cause the demolition, repair, or enclosure of dangerous and unsafe buildings or uncompleted and abandoned buildings within the territory of the municipality and may remove or cause the removal of garbage, debris, and other hazardous, noxious, or unhealthy substances or materials from those buildings. In any county having adopted by referendum or otherwise a county health department as provided by Division 5--25 of the Counties Code or its predecessor, the county board of that county may exercise those powers with regard to dangerous and unsafe buildings or uncompleted and abandoned buildings within the territory of any city, village, or incorporated town having less than 50,000 population.

The corporate authorities shall apply to the circuit court

of the county in which the building is located (I) for an order authorizing action to be taken with respect to a building if the owner or owners of the building, including the lien holders of record, after at least 15 days' written notice by mail so to do, have failed to put the building in a safe condition or to demolish it or (ii) for an order requiring the owner or owners of record to demolish, repair, or enclose the building or to remove garbage, debris, and other hazardous, noxious, or unhealthy substances or materials from the building. It is not a defense to the cause of action that the building is boarded up or otherwise enclosed, although the court may order the defendant to have the building boarded up or otherwise enclosed." 65 ILCS 5/11--31--1 (West 1996).

In City of Aurora v. Meyer, 38 Ill. 2d 131 (1967) our supreme court was faced with the same constitutional challenges to section 11--31--1 that defendants raise here. In City of Aurora the supreme court construed the statute as meaning that, if the specific defects that render a building dangerous and unsafe "may readily be remedied by repair, demolition should not be ordered without giving the owners a reasonable opportunity to make the repairs." City of Aurora, 38 Ill. 2d at 137. The supreme court declined, however, to express an opinion regarding whether the statute, as so construed, violated the constitutional provisions raised by the defendant, instead deciding that it could resolve the case without addressing the constitutional issues.

In our previous Supreme Court Rule 23 (166 Ill. 2d R. 23) order (Village of Lake Villa v. Stokovich, No. 2--00--0943 (2001) (unpublished order under Supreme Court Rule 23)), we also declined to address defendants' constitutional challenges based on our finding that defendants had the opportunity to choose whether to repair or demolish their building prior to plaintiff's demand for demolition and the trial court's subsequent demolition order. On February 28, 2002, our

supreme court in the exercise of its supervisory authority directed us to vacate our affirmance of the judgment of the circuit court of Lake County ordering demolition and to address defendants' claim that section 11--31--1 is unconstitutional.

Our research has revealed no Illinois authority that has ruled upon the constitutional challenges to section 11--31--1 that defendants raise. Defendants have directed us to other jurisdictions that have determined that a property owner has a constitutional right to choose repair or demolition irrespective of the cost of repair. We have found these cases instructive in reaching our decision.

Defendants argue that section 11--31--1 is unconstitutional because it fails to allow a property owner a reasonable time within which to repair his property after the receipt of a demolition notice and no opportunity whatsoever to repair after the constitutionally mandated judicial hearing has been held and a determination has been made that the property is unsafe and dangerous. Defendants assert that ordering demolition without giving an owner a reasonable time in which to repair his property and without considering the cost constitutes an unlawful taking or a due process violation.

Ordinarily, courts will employ a relaxed scrutiny of statutes, looking only to see whether the statute bears a reasonable relationship to a legitimate state interest. Tully v. Edgar, 171 Ill. 2d 297, 304 (1996). However, in cases where the right infringed upon is among those considered a "fundamental" constitutional right, such as a property right, courts subject the statute to "strict scrutiny." Tully, 171 Ill. 2d at 304. Under the strict scrutiny standard, the means employed by the legislature must be "necessary" to a "compelling state interest," and the statute must be narrowly tailored thereto, i.e., the legislature must use the least restrictive means consistent with the attainment of its goal. Tully, 171 Ill. 2d at 304-05.

Illinois courts have long recognized that the legislative

policy behind section 11--31--1 is to give municipalities the power to protect their citizens from dangerous and unsafe buildings or vacant and abandoned buildings that may prove detrimental to the public health, safety, and welfare. See, e.g., City of Chicago v. Nielsen, 38 Ill. App. 3d 941, 944 (1976) (section 11--31--1 gives the city "an effective tool for protecting its citizens from the unfortunate and degrading results of substandard and dangerous housing"); City of Chicago v. General Realty Corp., 133 Ill. App. 2d 662, 667 (1971) (the legislative policy behind section 11--31--1 is "the expeditious protection of the public from the dangers of unsafe buildings"). However, in protecting the public from dangerous and unsafe or vacant and abandoned buildings, the legislature must use the least restrictive means. In our view, the Illinois statute goes much further than necessary to protect the public interest. It gives minimal recognition to the right of the owner to correct defective conditions and affords local governments much discretion in selecting targets for demolition.

We agree with defendants that section 11--31--1 provides no choice of repair. As stated in the statute, a municipality "may demolish" or "cause the demolition" of a building it deems dangerous and unsafe without offering the owner the alternative of repair. The statute provides no safeguards to a property owner such as requiring that an inspection be made of the property prior to the issuance of a demolition notice or requiring the municipality to cite the specific defects or conditions that make the property in question unsafe and dangerous. The statute contains no standards or guidelines that a municipality must adhere to in determining if the property is unsafe and dangerous, yet it requires the property owner to correct the unknown conditions within 15 days. With the exception of the 15-day period between the time of the municipality's demolition notice and the time of the municipality's application to the circuit court for a demolition

order, an owner is allowed no time in which to make repairs. Moreover, in our view, any defects that are so serious as to cause a municipality to issue a demolition notice would be, in many instances, impossible to repair within 15 days. The statute affords a property owner neither a reasonable time period in which to make repairs nor the opportunity to make repairs that are not readily remedied prior to the municipality's application to the court for a demolition order. We agree with defendants that, as written, the statute allows municipalities "to haul property owners into court on the baldest of allegations."

In the present case a demolition notice and the original complaint for demolition were based on an exterior visual inspection done by a village trustee who posted a red card on the building indicating that it was unsafe, abandoned, dilapidated, and animal infested. About a week later the deputy director of the building and zoning department informed Dorothy Stokovich by letter that the building violated plaintiff's building code. No specific violations were cited and no inspection had been conducted of the building. The letter simply advised "unsafe abandoned structure must be brought up to the present building code or demolished." Likewise, when plaintiff subsequently sent defendants a notice of demolition on January 7, 1998, no specific defects or ordinance violations were cited and no inspection of the property had been conducted. Rather, the notice merely stated the property was in a dangerous and unsafe condition.

Up to the time of the January 7 notice, there had been no demonstrable emergency requiring the demolition of the building and no indication that the building imposed such an imminent threat to the safety of persons or property that its immediate destruction was necessary. Defendants should have been afforded a reasonable time to repair their building so as to comply with the applicable building code requirements unless the building presented an imminent threat to the safety of

persons or other property. Under section 11--31--1, however, an owner is provided with no absolute right to choose repair and no reasonable time in which to complete the repairs prior to the municipality's application to the court for a demolition order. More importantly, an owner is provided with no right to repair following the court's determination that the defects or conditions alleged by the municipality render the property unsafe and dangerous. Yet, before any hearing and determination, it would be uncertain what, if any, alleged defects render the property unsafe and dangerous. Our supreme court in City of Aurora addressed the necessity for a judicial inquiry and findings prior to an owner's obligation to make repairs. The court stated:

"The court should find from the evidence what the specific defects are which render the building dangerous and unsafe. If they are such as may readily be remedied by repair, demolition should not be ordered without giving the owners a reasonable opportunity to make the repairs." City of Aurora, 38 Ill. 2d at 137.

In enacting section 11--31--1, the legislature has failed to use the least restrictive means to protect the public from dangerous and unsafe or vacant and abandoned buildings. We think the better approach would have been one similar to that employed by the legislatures of other states in enacting their demolition statutes. Such legislative schemes are more representative of a statute that protects a compelling state interest while not infringing upon an owner's fundamental property right because they afford a property owner the choice of repair irrespective of the cost of the repairs. See, e.g., Hawthorne Savings & Loan Ass'n v. City of Signal Hill, 19 Cal. App. 4th 148, 23 Cal. Rptr. 2d 272 (1993); Herrit v. Code Management Appeal Board of City of Butler, 704 A.2d 186 (Pa. Commw. 1997); Johnson v. City of Paducah, 512 S.W.2d 514 (Ky. App. 1974); Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d

885 (1970).

In Hawthorne Savings & Loan Ass'n v. City of Signal Hill, 19 Cal. App. 4th 148, 160, 23 Cal. Rptr. 2d 272, 278 (1993), the City of Signal Hill (City) served Hawthorne Savings and Loan Association (Hawthorne) with a notice stating that a building official had determined that an apartment building complex acquired by Hawthorne through foreclosure was to be demolished. The notice cited 170 housing code violations. The Court of Appeals determined that the City had not afforded Hawthorne the opportunity to choose repair over demolition as required by due process and by section 17980 of California's Health and Safety Code (Code) (Cal. Health & Safety Code §17980 (Deering 2000)). Section 17980 of the Code specifically provided that an owner "shall have the choice of repairing or demolishing" a substandard building and that, if he chooses to repair, the building must be brought into compliance "according to a reasonable and feasible schedule for expeditious repair." Cal. Health & Safety Code §17980(b)(1) (Deering 2000). The court also determined that no health or safety reasons existed requiring immediate demolition and that, pursuant to statute, determining whether the buildings were suitable for repair was the owner's decision and not the municipality's. Hawthorne Savings & Loan Ass'n, 19 Cal. App. 4th at 160-63, 23 Cal. Rptr. 2d at 278-80.

Unlike the California statute, section 11--31--1 does not give the property owner the right to repair his property. Rather, the statute focuses on allowing a municipality to get rid of any building that it considers dangerous without affording an owner the opportunity of doing whatever is necessary to make the building safe and at whatever cost the owner is willing to spend. We agree with defendants that, as it presently exists, section 11--31--1 is unconstitutional because it authorizes a municipality to take private property without compensation and without due process by demolishing or requiring demolition

without first giving the owner the choices of repairing the property within a reasonable time and of spending whatever it costs to bring the property into compliance. As pointed out in Washington v. City of Winchester, 861 S.W.2d 125, 127 (Ky. App. 1997), the cost of compliance as well as the method is a property owner's decision and "far be it from the City to say how a reasonable person should spend his/her money."

In view of our determination that section 11--31--1 is unconstitutional, we vacate the judgment of the circuit court of Lake County ordering demolition and remand the cause with instructions that the court allow defendants a reasonable time in which to make repairs to their building before ordering demolition. Our determination makes it unnecessary to address defendant's remaining issues.

Reversed and remanded with directions.

BYRNE and KAPALA, concur.

In the Circuit Court of the Nineteenth Judicial Circuit
Lake County, Illinois

VILLAGE OF LAKE VILLA, an Illinois Municipal Corporation,	)	
Plaintiff,	)	
v.	)	No. 98 MR 75
DOROTHY STOKOVICH, as Trustee under Trust Agreement dated September 16, 1992, NICK STOKOVICH, and Unknown Owners,	)	
Defendants.	)	

THE COURT: I have a question about the difference in these two cases. In Bush it's highlighted here as opposed to Aurora and underlined language. I just see a difference there and I wonder if Counsel does as well. And one, it seems to imply, as the defendant has argued here, that the necessary repairs are just those that remedied the hazardous situation. Whereas in Aurora it goes to maybe ordered if there is substantial repairs necessary, substantial remodeling reconstruction. I just see a variance there in those two cases.

MR. MULLEN: The Supreme Court case was '67. This is '71. I don't think the Appellate Court has any ability to override the Supreme Court. I think that substantial reconstruction is the standard and I think that's what I mentioned in my motion to the directed verdict.

THE COURT: That's a First District as well. Any further argument? It's an interesting point because certainly –

MR. S. SPERANZA: Can I just add with respect to the

Count 3 there is a Court order with respect to when those fines would start and I have a copy in my file somtime in February of 1999, I believe.

MR. MULLEN: If that's what the Order says, that's fine.

THE COURT: Yeah, and I think that does present a little dilemma for me. Counsel is essentially arguing in the one hand the Bush case, which comes out of the First District - - no, that's a Second District, Appellate First District, Second Division. And the Supreme Court case, and there is a difference, it is pretty clear on how they look at it from my reading of these cases.

Following the Supreme court, I think it is something I have to do and I don't think we can say - - anyone here can really say substantial reconstruction isn't necessary.

As to evaluation, I suppose the best evaluation we have is the most recent cited, $100,000. Both mother and son testified to that evaluation. The rehab work coming from Skip Kreuger shows about 75, in there, 68, 69, and some add-ons and it worked out to about 75,000. That's a substantial reconstruction on a building that was recently sold for $100,000.

MR. C. SPERANZA: It was sold in the 70's, Judge. That's 22 years ago.

MR. MULLEN; We also have a 20-year deterioration in the interim.

THE COURT: All that be the case, it is the amount.

MR. C. SPERANZA: If I can say one, our City of Aurora versus Meyer, Supreme court case, Page 3 of the thing, I gave you, Head Note 3, it says: The law was more settled in the cases of this nature Courts do not go further to necessary - - to protect the public interest," What public interest is being protected by demolition in this area?

THE COURT: That's something you have to get to when you are talking about that first prong to meet that. And the health inspector was out there and talked about communicable diseases.

MR. C. SPERANZA: She said maybe. That was a guess on her part.

THE COURT: There was the test values to locks and openings in the perimeter of the house. Throughout the house there was feces and vermin and her worry about communicable disease.

You have the plumber testifying as to the possibility, not only of the mechanics, that I know, the gas that everyone directed some argument towards, but also towards the back flow of water into that system if that system is ever turned on. So that health possibility is there as well.

Then, of course, the dropping of the building itself in the vicinity of the various - - that the public could have access to, the location of it. The train station. I think there was a day care school nearby as well.

But overall, the inspectors all were of the conclusion that rehab wouldn't be worth it for this building and that seems to be supported by what information we do have. $78,000 to bring basically a portion of it up to a single family residence. That's major reconstruction.

Hibel's inspection, I suppose I could go through it, it does bring to mind the need to replace the electrical throughout as well as the plumbing, and the civil engineer also testified that his opinions were as to structural only and didn't include the need for total replacement of plumbing and electrical.

And when I look at cross examination I don't find anything earth shattering or any great difference in what the City's inspector testified to. Rogalla went into greater depth with his testing, and in fact, found some areas that went beyond what the City's did, the 500 square feet on the second level that

needed to be replaced. He found some structural defects in that area as well.

I look at his testimony as essentially unsupportive of any that the defense offers. He goes beyond it and says there are some structural defects. Not many. Things that he felt were repairable but nevertheless go beyond what the City offered in its case.

I think in addition, you have the addition of the porch areas that everybody agreed had some major problems, outside of the main facility, and those included some structural problems. And I don't believe on the estimate from Krueger any of those structural problems were addressed.

MR. C. SPERANZA: I believe he said the addition was going to come off.

THE COURT: He may have, but I don't recall that.

So all in all, I think Plaintiff has proven its Count 1 and an order of demolition should be entered.

MR. MULLEN: How much time do you wish the defendant to reply?

THE COURT: 30-days. It doesn't matter. Check and see which way this is.

MR. C. SPERANZA: Right.

THE COURT: Good luck.

MR. C. SPERANZA: Thanks.

THE COURT: In the event there is a demolition, the fines will help offset some of the costs. How is that? Otherwise, the fines are running until you get a stay order.

MR. MULLEN: I am trying to figure out how to word the Order. You're going to defer activating the fines?

THE COURT: Continue to activate but will be waived if there is a demolition or any stay thereof.

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

May 24, 2004

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No. 95118 - Village of Lake Villa, appellant v. Dorothy Stokovich, etc., et al., appellees. Appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on June 3, 2004.

SEP 17 2004

No. 04-269

In the Supreme Court of the United States

NICK STOKOVICH,

Petitioner,

v.

THE VILLAGE OF LAKE VILLA,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Illinois

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Village of Lake Villa ("Lake Villa"), an Illinois Municipal Corporation, respectfully submits this brief in opposition to Petitioner's, Nick Stokovich, petition for writ of certiorari.

Jurisdiction

This Court does *not* have jurisdiction pursuant to *28 U.S.C. 1257.* The February 20, 2004, Illinois Supreme Court opinion is not a final order within the meaning of the jurisdiction statute. The case was remanded for further proceedings which will include a determination by the trial court if Stokovich will be given another opportunity to repair the building. The demolition order was vacated. At this juncture, it is unknown if the trial court will ultimately enter a demolition order.

Statement of the Case

The building which is the subject of this litigation is a three story structure which is about 100 years old. (RP[1]-69, 436) The Stokovich family acquired the property in 1949. (RP-64) It was then used as a nursing home until 1977. (RP-64) The Stokovich family then ceased using this facility as it had built a new nursing home in Libertyville. (RP-64) It is undisputed that the building has not been occupied since 1992.

The Lake County, Illinois building department performs building inspection services for Lake Villa pursuant to a contract between the County and Lake Villa. (RP-232-233) On September 25, 1997, the building was red-tagged.

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[1] References to the record on appeal are as follows: (RP=transcript of trial court proceedings) (C=record on appeal), (Pl.Ex.=Plaintiff's Exhibit.).

(Pl.Ex. 34, 3rd page) The red tag indicated the building was unsafe, dilapidated, and animal infested. On October 3, 1997, the building department advised Dorothy Stokovich that the unsafe abandoned structure must be brought up to present building code or demolished. (Pl.Ex. 18).

No action was taken to demolish the building, to secure a building permit, nor to do any corrective work on the building. On January 7, 1998, the village attorney wrote to both Dorothy and Nick Stokovich that the building was in dangerous and unsafe condition and must be demolished within 30 days. (Pl.Ex. 5) The defendants did not demolish the building, secure a building permit, nor do any corrective work. (RP-348-349)

On February 18, 1998, Lake Villa filed its single count complaint for demolition of the building pursuant to 65 ILCS 5/11-31-1. (C-1-9) The defendants are Dorothy Stokovich[2] as Trustee under Trust Agreement dated September 16, 1992, Nick Stokovich, and Unknown Owners. Dorothy Stokovich is the mother of Nick Stokovich.

On August 20, 1998, Lake Villa filed its amended complaint. (C-113-168) Count I sought demolition. Count II sought in the alternative an order to require the defendants to do the necessary corrective work, and Count III sought fines for various Property Maintenance Code ("PMC") violations. Defendants filed an answer to Counts I and II but also filed a motion to dismiss Count III. (C-171-172) The defendants admitted that the property was red-tagged and that they had received the building department letter. (C-173-174) In their motion to dismiss,

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[2] Dorothy Stokovich is deceased. The current trustee is Bank One.

defendants argued inter alia that they were not given specific notice and an opportunity to repair. (C-173-174) This motion to dismiss was denied on September 22, 1998. (C-180) Defendants then on October 6, 1998, filed another motion to dismiss count III. (C-185-187) On October 29, 1998, the motion to dismiss count III was granted. (C-207)

On November 17, 1998, by certified mail (Pl.Ex. 7), and on December 11, 1998 by first class mail (Pl.Ex. 9), Lake Villa sent the defendants a supplemental notice. This same notice was also posted on the building on December 14, 1998, by Lieutenant Visconti. (Pl.Ex. 8) The supplemental notice provided in part:

> This notice supplements and expressly does not supersede the prior notice dated January 7, 1998, from myself to you.
>
> In the event that you do not desire to demolish the building, then, in that event, you must repair the building to eliminate the many current violations of the Village Code, as set forth on Exhibit A.
>
> You need to promptly apply for and secure a building permit to do this corrective work, and diligently proceed to make the corrective repairs within 60 days.
>
> If you elect to proceed with the repairs and do so diligently but are unable to complete them within the 60 day period, the Village will extend the time for completion for a reasonable period of time, upon good cause shown by you, to afford you sufficient time to complete all the required repairs.
>
> If, however, you fail to apply for and obtain a building permit and make substantial progress on the required repairs within said 60 day period, then, in that event, the Village will conclude that

you have no intention to repair the building and will proceed accordingly.

The defendants did not respond to this supplemental notice. They did not demolish the building. They did not secure a building permit to do the corrective work nor perform the corrective work. (RP-354-357)

On February 25, 1999, Lake Villa was granted leave to file its second amended complaint. (C-290) There was no substantive change in Counts I or II but Count III was modified to allege the service of the supplemental notice. (C-211-289)

On July 19, 2000, this matter proceeded to trial. Lake County, Illinois, Health Department sanitarian Schaefer testified that she inspected the property on June 4, 1998, with the other Lake County inspection crew. (RP-22) At that time she observed mouse droppings throughout the building and two piles of large mammal animal feces. (RP-25-26, 41-43) She observed many openings, holes, and gaps in the exterior of the building by which vermin or other animals could access the building. (RP-44-45) She further testified that mice can spread diseases. (RP-29) She issued a notice of violation of accumulation animal waste and infestation of vermin.(Pl.Ex. 29) She indicated that she had received no response from the defendants afer she issued the notices of violations other than a request by Stokovich's attorney that the notice indicate the correct article and section number. She then issued an amended notice but received no further response from the defendants. (Pl.Ex. 17)

Village Clerk Alice Brownlee testified that no potable water had been provided by the village to the building since 1989. (RP-50, 56)

Dorothy Stokovich, the trustee owner, testified that she had sold the building to her son, Nick, for $100,000 and

that he has paid $25,000 to her. (RP-61) She stated that the building was about 100 years old (RP-69) and that Nick had taken over responsibility for maintenance of the building in about 1980. (RP-65-66)

August "Augie" Hibel, who is the chief building inspector for the Lake County, Illinois, Building Department, testified at length. The defendants acknowledged that he was a pretty fair and honest guy. (RP-548)

Hibel testified inter alia:

He has been the chief building inspector since 1992 and has worked for Lake County since 1983. (RP-74-75) Prior to that he was building commissioner for North Chicago. (RP-75) He made two inspections of the property with his crew on June 4, 1998, and May 4, 2000. (RP-78-79)

He described the building generally as very dilapidated and deteriorated. (RP-79-80) The guard rails are dangerous and do not comply with code requirements. (RP-82-83, Pl.Ex. 10) The gutters are loose and pulling away from the building. (RP-83) The eaves which project over the sidewalk are falling apart. The roof is badly deteriorated. The chimney has missing bricks. (RP-85) There are numerous broken windows. (RP-85) There is widespread and severe water damage inside the building. (RP-85 & 95, Pl.Ex. 11 B, C, & D) There is no electrical power to building. (RP-90) The water heater is rusted out and non-functional.(RP-91) There is plaster falling off ceilings.(RP-91, Pl.Ex. 40 B & C, 41 A) The roof is leaking like a sieve. (RP-92), Pl.Ex. 41 A) The floors are missing structural blocking underneath. (RP-93, Pl.Ex. 41 C & D) The electrical wiring is substandard. (RP-93) There are holes in the roof. (RP-93-94, Pl.Ex. 42 A) The rafters and sheathing of roof are rotted and very deteriorated. (RP-95-96)

He testified that in his opinion it was unsafe for anyone to be in or near the building due to the overall condi-

tion of the property including the falling off to the street and sidewalk of pieces of the building, the plaster falling down within the building, the non-functioning doors, and dangerous hand rails. (RP-101, 125-126, 203-204)

He also stated that the building is damaged or deteriorated more than 50% of its value. (RP-105-106) The building does not conform with zoning setbacks. (RP-107) The guardrails do not comply with code and are danger to public. (RP-107-108) The building has been unheated for some time with resulting extensive damage. (RP-117) The failure to heat the building exacerbates wood rot of structural members. (RP-118)

He also testified to numerous violations of the Property Maintenance Code (Pl.Ex. 23):

a. (RP-108-109) violation of 304.1 exterior unsafe pieces of overhang falling off.

b. (RP-109-110) roof members damaged in violation of 304.3.

c. (RP-111) exterior walls deteriorated in violation of 304.5.

d. (RP-112) overall roof is badly deteriorated in violation of 304.6 and has caused extensive water damage.

e. (RP-113) overhangs do not comply with 304.8.

f. (RP-115) chimneys defective, missing bricks, spalling.

g. (RP-116) glazing broken in violation of 304.11.

h. (RP-116) door frames and doors not operable in violation of 304.11.

i. (RP-118) basement windows do not have guards 304.15.

j. (RP-119) exterior doors non-code; deteriorated and broken 304.13.

k. (RP-120) interior is deteriorated and violates 305.1.

l. (RP-120) interior stairs do not have functioning rails 305.5.

m. (RP-123) plumbing does not comply with 505.1.

n. (RP-123) heating does not comply with 602.2.

o. (RP-125) ingress inadequate and violates 702.1.

He indicated that the building is unsafe to people who use the adjacent sidewalk. (RP-125-126) He observed no substantive change in the building from 1st inspection to 2nd inspection, but the 2nd inspection revealed holes in roof. (RP-127-129) The front porch is sagging due to unstable foundation. (RP-150) The roof had at least three holes into the sky. (RP-150151) The fireplace is in rough condition with brick misplaced. (RP-170-171) It would cost more to rehab building then it is presently worth. (RP-175-176) There was no difference between two inspections except for more patchwork. (RP-197) Most doors are non-functional. (RP-203-204) The property is not clean, safe, or secure. (RP-234)

He also stated that the property was a blight on the neighborhood. (RP-235) He indicated that it would basically require a complete replacement of the building except for part of the framing to render this building into a habitable structure.(RP-235-238)

Lake County plumbing inspector Thompson, who has been an Illinois-licensed plumber for 25 years and previously a plumber apprentice for 5 years, testified that he was current on plumbing regulations.(RP-253-256) He indicated that the plumbing system in the building was

completely non-functional. A complete replacement of the plumbing system would be necessary as the existing system can not be safely salvaged. (RP-257-262) Open waste lines within the building create the danger of methane gas which can be fatal (RP-258-259). The problem is more severe because there is no running water in the building to fill the plumbing traps which prevent the gases from escaping into the building. He also indicated that there was a danger of contaminating the Village water system if this building were to be hooked up to the municipal system. (RP-260-261) He stated that the fact that the water was presently shut off did not cure this problem since any plumber could reconnect the building at any time. (RP-270-271) He found no change between inspections. (RP-264) Article 8/9-160 of the building code does require a building to have a functioning plumbing system. (RP-276)

Lake County mechanical inspector Wierzgac, who has 23 years in the field, testified that he was current on codes through 1993. (RP-279) The building does not have a functional heating system. (RP-280) The venting is non-functional. (RP-282) The roof decking and soffits are rotted. (RP-285-286) He also observed racoon feces in the building. (RP-293)

Lake County structural inspector Wells testified that the roof structure and roof decking were deteriorated with holes in the roof. (RP-302) He observed rotted lumber and lumber hanging down out of place. (RP-309-310)

Lake County inspector and village trustee Bill Effinger testified that he had lived in Lake Villa all his life. (RP-316) He has observed racoons in the building. (RP-321) He has observed preschool children and other pedestrians walk alongside the building in the area where portions of the roof and overhang have fallen from the building. (RP-325-327) It was he who originally posted the red tag

on the building in 1997. (RP-328-329) Over the course of time the building has progressively deteriorated. (RP-329)

Nick Stokovich testified as an adverse witness. He has lived at his current home since 1992 or 1993. (RP-346) He did receive Pl.Ex. 18 in October, 1997. (RP-347) He did not thereafter obtain a demolition permit nor did he apply for or secure a building permit. (RP-348-349) He did receive the letter of January 7, 1998, Pl.Ex. 5. (RP-351) At that time he also did not get a demolition permit nor a building permit. (RP-351) He also received the November 7, 1998 letter, Pl.Ex 7. (RP-351-352) Again, he did not get any building permit. (RP-354-355) The building was last used as a nursing home in 1977.(RP-357) It was last inhabited on a regular basis in 1992. (RP-358) It last had running water, water heaters, and an operating sink in 1992. (RP-358) The building is about 45 feet high. (RP-359) The building has not been heated since 1989. (RP-362) He is responsible for maintenance of the building. (RP-363-364)

Structural engineer Rogalla testified that he had observed damaged areas at the south end of the building in joists and that about 500 square feet of roof needed to be replaced. (RP-440-441, 465-466) He also observed damage to flooring. (RP-443) The roofing needed repair. (RP-445) In fact, the roofing throughout looked bad and needed to be replaced. (RP-446) He opined that it might be cheaper to repair the building rather than demolish and rebuild. (RP-457) In reaching this conclusion he acknowledged that he had not secured any bids and admitted that he did not take into account the cost to repair or condition of the mechanical systems such as the electrical, heating, and plumbing systems. (RP-458, 470) He further did not take into account the zoning height limitation and setback requirements. (RP-470-474)

Skip Krueger testified for the defendants. He is a manufacturer's representative for Ideal Industries. (RP-479) He had previously had a heating and ventilating business that had evolved into a small contracting business. (RP-481) He had done work for the defendants in the past including heating and ventilating work at their new nursing home. (RP-485)

Krueger testified that he had prepared an estimate to convert the building into a single family residence. Over plaintiff's objection the estimate was admitted. (Defendant. Ex 9, RP-490-491). He acknowledged that he had not entered into a contract to do the work. The estimate did not include insulating the walls or a furnace. (RP-496, 504-505) He stated that he would not enter into contract for the estimate amount but would add more for a contract price. (RP-505) His actual price would be closer to $75,000. (RP-506) In preparing his estimate, he did not take into account that the 3rd floor would have to be removed due to height limitations of the zoning ordinance. (RP-506-507) He also did not take into account the need to move the foundation back to satisfy the setback requirements. (RP-507-508)

Desko Nokitovic, a licensed real estate salesman since 1996, then testified. (RP-510-511) He had been involved in some sales or showings in Lake Villa. (RP-513) He went inside the building in 1998. (RP-514-515) He did not indicate that he had done any type of market analysis or found comparable sales to do a market analysis of the building. The plaintiff's objection to his testifying to his opinion of the value of the building was sustained for inadequate foundation. (RP-516-518)

Nick Stokovich testified for the defendants. He has worked at the Libertyville Manor Nursing home since 1977. (RP-519-520) He agreed to pay $100,000 to buy the building from his mother. (RP-520) He has been

responsible for the property since 1978. (RP-520) He stated that he also was a licensed real estate person but is not active in that field. (RP-519, 534) He stated that he was familiar with real estate values in Lake Villa. (RP-534) The plaintiff's objection to his opinion of value was also sustained. (RP-534-535) Stokovich made an offer of proof that the value of the property was $150,000 to $160,000.

At the conclusion of the trial, the trial court found that the building was dangerous and unsafe and ordered demolition on Count I. Count II which sought an order to do the necessary corrective work was deemed moot. On Count III, the court entered judgment in favor of Lake Villa but deferred imposing the fines at that time and indicated the fines would depend in part upon whether the defendants accomplished the demolition within 30 days, which did not occur. (C-500, 515-516). On October 21, 2002, the Appellate Court vacated its June 27, 2002, Rule 23 order, which had affirmed the trial court, and entered its decision in which the Appellate Court found 65 ILCS 5/11/31-1 unconstitutional and reversed and remanded for the trial court to grant a reasonable period of time for repair before ordering demolition.

Lake Villa appealed to the Illinois Supreme Court. On February 20, 2004, the Illinois Supreme Court issued its decision in which it reversed the appellate court and found the demolition statute, 65 ILCS 5/11/31-1, constitutional. However, the court also vacated the demolition order and remanded for further proceedings. The court agreed with the trial court that the building is dangerous and unsafe but concluded that the trial court's finding that the building is beyond reasonable repair was not supported by the evidence. The petition for rehearing was denied on May 24, 2004.

I. Argument

Lake Villa urges that the petition for writ of certiorari should not be granted.

A. No Jurisdiction

This Court does not have jurisdiction pursuant to *28 U.S.C. 1257*. The February 20, 2004, Illinois Supreme Court opinion is not a final order within the meaning of the jurisdiction statute. *San Diego Gas & Electric Co. v. City of San Diego* (1981) 450 U.S. 621,630-633, 101 S. Ct. 1287,1293-1294. The case was remanded for further proceedings which will include a determination by the trial court if Stokovich will be given another opportunity to repair the building and if a demolition order is to be entered. *Village of Lake Villa v. Dorothy Stokovich et al.* (2004) 211 Ill.2d 106, 810 N.E.2d 13; *Aurora v. Meyer* (1967) 38 Ill.2d 131, 230 N.E.2d 200, 203. The demolition order was vacated. At this juncture, it is unknown if the trial court will ultimately enter a demolition order.

B. Case Not Ripe For Review

If this Court determines that it does have jurisdiction, in the alternative, the case is not yet ripe for review. The demolition order was vacated. At this juncture, it is unknown if the trial court will ultimately enter a demolition order.

Stokovich argues before this Court that the statute does not provide for an opportunity for repair *after* the trial in which the building is found dangerous an unsafe. However, whether Stokovich will now be afforded an additional opportunity to repair is not yet known. Upon remand, if the trial court finds that the building is in fact not beyond reasonable repair, it will order Stokovich to perform the repairs. If the repairs are not done, then the

trial court will order demolition. On the other hand, if after reviewing the Illinois Supreme Court opinion and hearing any additional evidence it deems advisable, the trial court finds that the repairs would constitute substantial reconstruction within the meaning of *Aurora v. Meyer* (1967) 38 Ill.2d 131, 230 N.E.2d 200, 203, the court may order demolition without any additional opportunity for repairs. The point is that the case is not yet ripe for this Court to review. Stokovich may yet receive another opportunity to repair. For this Court to consider the case at this juncture would be premature and contrary to judicial economy.

C. Case Is Not in Conflict with Other State Court Decisions

None of the cases or affected statutes cited by Stokovich are comparable to Illinois with its demolition statute. *65 ILCS 5/11-31-1.* Unlike other jurisdictions, an order of demolition comes not from the municipality but rather from a court after a trial on the merits in which the municipality must plead and prove that the building is dangerous and unsafe. Unlike other jurisdictions, even before a suit is filed, the owner must be given written notice and has an opportunity to repair at any cost before the lawsuit is filed.

65 ILCS 5/11-31-1(a) provides in part:

> The corporate authorities shall apply to the circuit court of the county in which the building is located (I) for an order authorizing action to be taken with respect to a building if the owner or owners of the building, including the lien holders of record, after at least 15 days' written notice by mail so to do, have failed to put the building in a safe condition or to demolish it or (ii) for an or-

> der requiring the owner or owners of record to demolish, repair, or enclose the building or to remove garbage, debris, and other hazardous, noxious, or unhealthy substances or materials from the building.

Even after the court has a trial on the merits the statute has already been construed to require the trial court to allow the owner an opportunity for repair before ordering demolition unless substantial reconstruction is necessary to effectuate the repairs. *Aurora v. Meyer* (1967) 38 Ill.2d 131, 230 N.E.2d 200, 203.

The cases cited by Stokovich are readily distinguishable and not in conflict with the Illinois Supreme Court decision in this matter. In *Johnson v. City of Paducah* (Ky.App.1974) 512 S.W.2d 514, demolition was ordered and the owner was denied <u>any</u> opportunity to repair because the cost of repair would exceed 50% of the value of the property. That court also found that an owner should have a chance to repair no matter what the cost before demolition is ordered.

In *Horton v. Gulledge* (1970) 277 N.C. 353, 177 S.E.2d 885, the owner was also ordered to demolish the building with <u>no</u> chance to repair because the cost of repairs would exceed 60% of the value of the property. The estimated cost to repair was between $500-700 and the value was between $2,000 to $3,000. The court found the mandatory demolition just because of the 60% cost factor invalid because it denied the owner <u>any</u> opportunity to repair.

In *Washington v. City of Winchester* (Ky.App.1993) 861 S.W.2d 125, 127, the owner was also given <u>no</u> opportunity to repair because of a provision in the property maintenance code that mandates demolition if the estimated cost of repairs is in excess of 100% of the value of the property. That court followed the holding of *Johnson v. City of*

Paducah (Ky.App.1974) 512 S.W.2d 514 and held that the owner should have been given an opportunity to repair.

Stokoviches' reliance on *Shaffer v. City of Atlanta* (1967) 223 Ga. 249, 154 S. E. 2d 241 is similarly ill-advised. In Shaffer, the city ordered the building demolished and thereafter refused to allow the owner to obtain a building permit to correct the problems. In the case at bar, the Stokoviches were invited to secure a permit to do the necessary corrective work, as evidenced by the notice sent by the building department on October 3, 1997 (Pl.Ex. 18.) as well as the Lake Villa supplemental notice. (Pl.Ex. 9). In the case at bar, we don't even know yet if Stokovich will be afforded another opportunity to repair or if an order of demolition will be entered.

The Stokoviches complain that the statute does not give them an opportunity to repair but the underlying facts are otherwise. They cannot complain of a fate which has not befallen them. On September 25, 1997, the building was red-tagged. (Pl.Ex. 34, 3rd page) The red tag indicated the building was unsafe, dilapidated, and animal infested. On October 3, 1997, the building department advised Dorothy Stokovich that the unsafe abandoned structure must be brought up to present building code or demolished. (Pl.Ex. 18, Appendix 9.)

No action was taken to demolish the building, to secure a building permit, nor to do any corrective work on the building. On January 7, 1998, the village attorney wrote to both Dorothy and Nick Stokovich that the building was in dangerous and unsafe condition and must be demolished within 30 days. (Pl.Ex. 5, Appendix 10) The Stokoviches did not demolish the building, secure a building permit, nor do any corrective work. (RP-348-349)

What is also different from all the cases relied upon by Stokovich is that even after the suit was filed Lake

Villa advised the Stokoviches that they could repair the building in lieu of demolition if they so chose.

On November 17, 1998, by certified mail (Pl.Ex. 7), and on December 11, 1998 by first class mail (Pl.Ex. 9), Lake Villa sent the Stokoviches a supplemental notice. A copy was also posted on the building. (Appendix 11) The supplemental notice provided in part:

> This notice supplements and expressly does not supersede the prior notice dated January 7, 1998, from myself to you.
>
> In the event that you do not desire to demolish the building, then, in that event, you must repair the building to eliminate the many current violations of the Village Code, as set forth on Exhibit A.
>
> You need to promptly apply for and secure a building permit to do this corrective work, and diligently proceed to make the corrective repairs within 60 days.
>
> If you elect to proceed with the repairs and do so diligently but are unable to complete them within the 60 day period, the Village will extend the time for completion for a reasonable period of time, upon good cause shown by you, to afford you sufficient time to complete all the required repairs.
>
> If, however, you fail to apply for and obtain a building permit and make substantial progress on the required repairs within said 60 day period, then, in that event, the Village will conclude that you have no intention to repair the building and will proceed accordingly.

The Stokoviches did not respond to this supplemental notice. They did not demolish the building. They did not secure a building permit to do the corrective work nor

perform the corrective work. (RP-354-357). Unlike the owners in the cases cited by Stokovich, the Stokoviches had an opportunity to repair before the suit was filed, as well as while the suit was being prosecuted, both because of the lapse of time between the date the complaint was filed to the date of trial, a period in excess of two years, and through the supplemental notice from Lake Villa.

The decision of the Illinois Supreme Court is consistent with and not in conflict with the state cases cited by Stokovich.

D. No Conflict with *Miller V. Schoene*

In *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246 (1928) the order to fell cedar trees to avoid the spread of cedar rust disease to nearby apple trees was affirmed. Stokovich fails to articulate how this case is in conflict with the decision in *Village of Lake Villa v. Dorothy Stokovich et al.* The demolition order was vacated. At this juncture, it is unknown if the trial court will ultimately enter a demolition order.

II. Conclusion

Lake Villa submits that a writ of certiorari should not issue. This Court does not have jurisdiction because the decision is not final. In the alternative, the case is not yet ripe for review and Stokovich has failed to establish that the decision is conflict with any federal or state cases which might warrant the issuance of the writ. Lake Villa requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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